INDEX

Subject Index

	Page
Statement as to jurisdiction	1
Opinion and judgment of Wisconsin Court	1
Jurisdiction	2
Federal questions presented	3
Statement respecting time and manner of raising and presenting the constitutional question in the State Courts	7
Finality of the judgment of the Wisconsin Supreme Court	17
The constitutional questions are substantial	18
Appendix "A"—Opinion of Supreme Court of Wisconsin, opinions, findings of fact, conclusions of law and judgment the Circuit Court of Milwaukee County and copies of the pleadings	23

Table of Cases Cited

Baker v. *Department of Taxation*, 246 Wis. 611, 18 N. W. (2d) 331	1
Baker v. *Leenhouts*, 257 Wis. 584, 44 N. W. (2d) 544	9
Boston Store v. *Katz*, 153 Wis. 492	15
Briggs & Stratton Co. v. *Wisconsin Dept. of Taxation*, 248 Wis. 160, 21 N. W. (2d) 441	6, 13
Carter v. *Texas*, 177 U. S. 442	16
Colgate v. *Harvey*, 296 U. S. 404, 56 S. Ct. 252, 80 L. ed. 299	4
Conn. General Life Ins. Co. v. *Johnson*, 303 U. S. 77, 82 L. ed. 673, 58 S. Ct. 436	4, 12
Consolidated Coal Co. v. *Illinois*, 185 U. S. 203, 46 L. ed. 872	13
Davis v. *O'Hara*, 266 U. S. 314, 69 L. ed. 303	16
Davis v. *Wechsler*, 263 U. S. 22, 68 L. ed. 143	16
Greene v. *Tax Commission*, 221 Wis. 531, 266 N. W. 270	11
Hess v. *Pawloski*, 274 U. S. 352	4

Page

Int. Steel & Iron Co. v. *Nat. Surety Co.*, 297 U. S. 657, 80 L. ed. 961 16
J. I. Case Threshing Machine Co. v. *Johnson*, 152 Wis. 8 15
Lawrence v. *State Tax Commission*, 286 U. S. 276 ... 15
Murdock v. *Pennsylvania*, 319 U. S. 105, 87 L. ed. 1292 4
National Mutual Bldg. & Loan Association v. *Brahan*, 193 U. S. 635 13
Nelson v. *Caddo-Texas Oil Lands Co.*, 176 Wis. 327 14
Newport Co. v. *Tax Commission*, 219 Wis. 293 ..... 5, 11, 12, 13
New York, ex rel. Bryant v. *Zimmerman*, 278 U. S. 63, 73 L. ed. 184 4
O'Brien v. *Whedock*, 184 U. S. 450, 46 L. ed. 626 12
Safe Deposit and Trust Co. v. *Virginia*, 280 U. S. 83, ... 4, 11, 16
State ex rel. Manitowoc Gas Co. v. *Wisconsin Tax Commission*, 161 Wis. 111, 152 N. W. 848 6
Truax v. *Corrigan*, 257 U. S. 313, 66 L. ed. 254 16
Union Pac. R. R. Co. v. *Public Service Comm.*, 248 U. S. 67, 63 L. ed. 131 15
Wendlandt v. *Industrial Comm.*, 39 N. W. (2d) 854, 256 Wis. 62 14

STATUTES CITED

Constitution of the United States, 14th Amendment, ... 7, 8, 11, 12, 13, 18
Corpus Juris Secundum, Vol. 16, Sec. 89, pg. 183 12

United States Code, Title 28:
Section 1257 ..... 3, 4, 7
Section 2103 7

Wisconsin Statutes, Section 270.33 ..... 12, 17

Wisconsin Statutes of 1945:
Section 71.01(1) 3, 5, 8, 9, 10, 12, 13, 16, 17
Section 71.02(3) (e) 5
Section 71.09(6) 2, 7
Section 71.09(2) 7

IN SUPREME COURT, STATE OF WISCONSIN

AUGUST TERM, 1950

No. 55

NORMAN L. BAKER,
Plaintiff-Appellant,

vs.

JOHN H. LEENHOUTS, WISCONSIN DEPARTMENT OF TAXATION, AND GEORGE M. HANLEY, SHERIFF.
Defendants-Respondents.

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, the Plaintiff-Appellant submits herewith his statement particularly disclosing the basis upon which the Supreme Court of the United States has jurisdiction on appeal to review the judgment of the Supreme Court of the State of Wisconsin entered in this cause.

Opinion and Judgment of Wisconsin Court

The opinion of the Supreme Court of Wisconsin is reported in Vol. 257, page 584 of Wisconsin Supreme Court

Reports and Vol. 44, page 544 of The Northwestern Reporter, 2nd Series.

A copy of that opinion, and also copies of the opinions, Findings of Fact and Conclusions of Law and judgment of the Circuit Court of Milwaukee County, affirmed by the judgment of the Supreme Court of Wisconsin, and copies of the pleadings in the action, are attached hereto as Appendix A.

However, the final judgment of the Supreme Court of Wisconsin was its decree upon Plaintiff-Appellant's motion for rehearing, overruling and denying the motion, with costs, entered in the records of said Court January 9, 1951. This petition for appeal therefrom is presented to the Chief Justice of the Supreme Court of Wisconsin herewith, on this 2nd day of April, 1951.

Jurisdiction

The jurisdiction of the Supreme Court of the United States, to review said decision and final judgment of the Supreme Court of Wisconsin, by direct appeal is conferred by Title 28, United States Code, Section 1257 (2).

The Plaintiff-Appellant is and always has been a citizen of the United States, and during the years 1943, 1944 and 1945 his domicile was in the State of Michigan, as found and adjudged in the judgment in this action.

The action was brought to avoid and enjoin the collection of income tax assessments of appellant's entire income of the years 1943, 1944 and 1945, including income from his securities held by him at his domicile in Michigan, and compensation for professional services rendered in various states other than Wisconsin.

The assessments were made under authority of Section 71.09 (6) Wisconsin Statutes of 1945, page 1197, which reads: "(6) In case of the failure on the part of any per-

son to make a report of income within the time and in the manner prescribed by law, the Department of Taxation or Assessor of Income may enter an assessment against said person upon ten days' notice in writing in a sum of not less than $500.00. Such notice may be served by mail. After the tax on such assessment has been entered on the assessment roll, the person assessed shall be forever barred from questioning the correctness of the same in any action or proceeding."

The Circuit Court and the Supreme Court on appeal, justify the assessment by the provision which appellant here emphasizes, of Section 71.01 (1) Wisconsin Statutes, 1945, page 1182 to-wit:

"71.01 *Persons and subjects taxable.* There shall be assessed, levied, collected and paid a tax on all net incomes as hereinafter provided, by every person residing within the state or by his personal representative in case of death, and by every nonresident of the state, upon such income as is derived from property located or business transacted within the state, except as hereinafter exempted. Every natural person domiciled in the State of Wisconsin, and every other natural person *who* maintains a permanent place of abode within the state or *spends in the aggregate more than seven months of the income year within the state, shall be deemed to be residing within the state for the purposes of determining liability for income taxes and surtaxes.* * * * "

Federal Questions Presented

In the Circuit Court and in the Supreme Court, appellant claimed that such provision if applied to the income of one domiciled in another state, was unconstitutional and invalid, because it would tax *subjects not within the power*

of the state to tax and because it would *abridge the fundamental rights of a citizen of the United States*, in violation of the provisions of Section 1 of the 14th Amendment.

While the State courts avoided a direct statement that the provision was valid, they denied appellant's claim and enforced the law. That constitutes a decision in favor of the validity of the law, within the meaning of 28 U.S.C. Section 1257 (2); N.Y. ex rel *Bryant* v. *Zimmerman* 278 U.S. 63, 67; 73 L. Ed. 184, 187.

Appellant's claim that the provision violates the 14th Amendment, Section 1, because it selects for taxation subjects not within its power to tax, is supported by *Safe Deposit & Trust Co.* v. *Virginia*, 280 U.S. 83.92, holding:

"A statute of a state which undertakes to tax things wholly beyond her jurisdiction or control conflicts with the Fourteenth Amendment."

Conn. General Life Ins. Co. v. *Johnson, Treasurer*, 303 U.S. 77; 82 L. Ed. 673; 58 Sup. Ct. 436.

Appellant's claim that the provision is unconstitutional and void because it would abridge or preclude the exercise of fundamental rights guaranteed by Section 1 of the 14th Amendment is supported by these cases:

Hess v. *Pawloski*, 274 U.S. 352, 355;

Colgate v. *Harvey*, 296 U.S. 404, 431, 56 Sup. Ct. 252, 80 L. Ed. 299;

Murdock v. *Pennsylvania*, 319 U.S. 105, 87 L. Ed. 1292.

Thus the case and the judgment of the Supreme Court of Wisconsin present federal questions which are subject to review by the Supreme Court of the United States, and which are properly submitted to that Court by direct appeal, pursuant to Sec. 1257 (2), 28 U.S.C.

Though less pertinent to those questions of the jurisdiction of the Supreme Court of the United States, than to the

question of the time and manner of presenting appellant's claim in the Circuit Court, attention is called to other cases and statutes of the State of Wisconsin. Wisconsin Statutes of 1945 and earlier statutes contain a provision in legal effect similar to said provision of Sec. 71.01 (1) but relating to income of corporations. It is Section 71.02 (3) (e), Wisconsin Statutes of 1945, page 1187, reading: "A foreign corporation whose principal business is carried on or transacted in Wisconsin shall be deemed a resident of this state for income tax purposes, and its income shall be determined and assessed as if it were incorporated under the laws of Wisconsin, notwithstanding its domicile is elsewhere."

In *Newport Co.* v. *Tax Commission*, 219 Wis. 293, the Supreme Court of Wisconsin held that provision invalid in the following language: "The state's next contention is that the State of Wisconsin, if the taxpayers principal business is located here, may, by legislative fiat, domesticate the corporation for purposes of taxation, and by this process give to its intangible property a local status. . . .

It seems evident to us that a state may not, by definition, construction, or other process, *domesticate a person* or corporation in fact domiciled elsewhere, in order to avoid the application of constitutional principles established by the Supreme Court of the United States relative to jurisdiction for purposes of taxation. To say that it may do so is to contend that the limits of the state's jurisdiction to tax are wholly selfimposed." (Emphasis of words "domesticate a person" supplied.)

Any doubt as to the purpose of the seven months provision of Sec. 71.01 (1) Wisconsin Statutes, to "domesticate a person . . . in fact domiciled elsewhere, in order to avoid the application of constitutional principles established by the Supreme Court of the United States relative

to jurisdiction for purposes of taxation" will be dispelled by reference to the construction of that provision by the Wisconsin court, in this case. Under that construction one becomes domesticated for purposes of taxation without having actually spent seven months in the state when he comes into the state for *"business activities"*. Then absence from the state for business purposes or for pleasure is to be considered time spent in the state, just as if he were domiciled in the state.

The Wisconsin Supreme Court recognises that income from securities of one domiciled without the state can not be subjected to Wisconsin income tax, constitutionally. Thus, in *State ex rel Manitowoc Gas Co.* v. *Wisconsin Tax Commission*, 161 Wis. 111, 114; 152 N.W. 848, 849 that court said: "The taxing power of a state does not extend beyond its territorial limits. *Union R.T. Co.* v. *Kentucky*, 199 U.S. 194, 26 Sup. Ct. 36. Within such limits it may tax persons, property, income, or business. State Tax on Foreign held Bonds, 15 Wall. 300. If the tax be on property it, or its lawfully constituted situs must be found within the state. If an interest in property is taxed the situs of either the property or interest must be found within the state. If an income be taxed, *the recipient thereof must have a domicile within the state* or the property or business out of which the income issues must be situated within the state so that the income may be said to have a situs therein." (Emphasis supplied)

Agreeable to state laws as well as federal law and constitution, the income of one domiciled in another state even though it includes earnings from services rendered in the state was not, in 1943, 1944 and 1945, selected for or subjected to taxation by statutes, regulations or practice of Wisconsin. *Briggs & Stratton Co.* v. *Wisconsin Dept. of Taxation*, 248 Wis. 160, 21 N.W. 2d 441.

Appellant is confident that in view of the authorities above cited, the several federal questions suggested by the Assignment of Errors will be correctly presented to the Supreme Court of the United States by direct appeal pursuant to Sec. 1257 (2) 28 U.S. Code; but if he is in error and it should be considered that such federal questions or any of them should be submitted for review by writ of certiorari instead of appeal, then appellant prays that these papers and this jurisdictional statement be regarded and acted on as a petition for writ of certiorari to review any such questions as if duly presented by certiorari to the Supreme Court at the time the appeal was taken, as provided by Section 2103, 28 U. S. Code.

The fundamental question presented upon the appeal is whether the first Section of the 14th Amendment, and appellant's rights under it, were violated by the levy of an income tax upon income not within the power of the state to tax, and were violated because such tax abridged the exercise of appellant's rights guaranteed by the Amendment. An important question is presented in limine, i.e. whether the constitutional question was properly and timely presented in the State courts.

Statement Respecting Time and Manner of Raising and Presenting the Constitutional Question in the State Courts.

Certain elements of subsection 6 of Sec. 71.09 Wisconsin Statutes, under which the assessments were made, are inconsistent with the Wisconsin Constitution and law, and in connection with the allegation of plaintiff's complaint that such elements were invalid, the complaint alleges that the provision "*if applicable to the case of one who is or claims to be domiciled in another state and for that reason not a taxpayer of Wisconsin and not liable to income taxa-*

tion and not required to make a report of his income to the assessor, is unconstitutional and void for the reason that it would contravene, violate and deny the plaintiff any protection of the following provisions of the Constitution of Wisconsin and the Constitution of the United States" followed by a complete quotation of Sec. 1 of the Fourteenth Amendment.

This was intended to charge and must have been understood to charge that as to the nonresident the entire provision of subsection 6, and any tax assessed under it upon the income of one domiciled in another state would contravene the 14th Amendment. It claimed the protection of the 14th Amendment from the assessments as well as from the statute under which they were made, as against every possible pretext. The seven months provision of Section 71.01 (1) was not mentioned because its invalidity was thoroughly established by the decisions and considered the well settled law of the state, and because the plaintiff was informed and believed that the assessments were made solely upon the claim that he was domiciled in Wisconsin, and that no claim of liability was based on that provision and it was not involved in the issues. Express declarations to that effect are not in the record, but those facts are proven by the following circumstances in the record:

For many years prior to 1941, appellant was employed as Assistant Counsel of the Northwestern Mutual Life Ins. Co. of Milwaukee. He maintained a home at Milwaukee, Wisconsin, which was his selected domicile, but for more than 25 years he had maintained a summer home at Beulah, Michigan. He planned to retire in 1941, upon reaching the age of 70 years (the normal retiring age, although he was permitted by the rules of that company to continue his employment for an additional five years), and before January 1, 1941, he selected his summer home at Beulah as his

permanent home and domicile. However, in 1941, because two members of the legal department had been called to military service because of the imminence of war, and to save their positions for them upon their return, appellant consented to continue his service until their return. Although appellant had effected his change of domicile and had assumed liability to taxes upon his intangible property and other taxes, at the place of his domicile in Michigan, his entire income of 1941 and later of 1942 was assessed in Wisconsin. The assessments were expressly claimed to be justified by the seven months provision of Sec. 71.01 (1). Before the Department of Taxation and in the Circuit Court upon appeal, as well as in the Supreme Court of Wisconsin upon appeal from the judgment of the Circuit Court, appellant orally and in briefs argued that said provision was invalid and unconstitutional unless it was considered as a mere disputable presumption, and cited numerous decisions in support of that argument. The Supreme Court of Wisconsin held appellant liable to the assessments on the sole ground that he had not effected a change of domicile because he had not entirely abandoned his home in Milwaukee and because of the continuance of his employment in the state, without reference to the seven months provision. (*Baker* v. *Department of Taxation*, 246 Wis. 611, 18 N.W. 2d 331.) Manifestly, the court did not refer in its opinion to the question of the validity of that provision, and based its decision upon the ground that appellant had not succeeded in changing his domicile (though plainly it ignored his rights under the 14th Amendment and disregarded established principles respecting change of domicile) because the invalidity of that provision was a completely settled question.

The complaint alleges that plaintiff's domicile and residence is at Beulah, Michigan. This of course referred to actual residence incident to domicile. Neither the denial of

that allegation nor the allegation of the answer that plaintiff was domiciled and resided in Wisconsin during 1943, 1944 and 1945, furnishes the slightest suggestion that the assessments were made under or justified by the seven months provision; and there was no allegation that they were.

Upon the trial plaintiff testified that he discontinued keeping a record of time spent at his domicile in Michigan or elsewhere in 1944 and 1945 because he concluded "that it was not claimed any longer" that the provision was valid and concluded "that my liability was based entirely upon being domiciled in Wisconsin, as these decisions held" (referring to the earlier cases holding plaintiff was domiciled in Wisconsin, and therefore liable to income taxes in 1941 and 1942). This testimony brought forth no denial or claim from the defendants that plaintiff's liability in this case was based on the seven months provision.

At no time during the trial did the attorney for the Wisconsin Department of Taxation or the assessor who was present and a witness at the trial, make any claim, argument or suggestion, that the seven months provision of Sec. 71.01 (1) Wisconsin Statutes was involved in the issues or justified the assessments. On the contrary the claim of liability was based solely upon the argument that plaintiff was domiciled in Wisconsin all the years 1943, 1944 and 1945 and all the time. The oral arguments are not in the record but the brief of the Department of Taxation as well as that of the plaintiff are in the record and were certified to the Supreme Court of Wisconsin. In the brief for the Department not only is the claim of liability based solely upon the assertion that plaintiff was domiciled in Wisconsin, but, inconsistent with any claim of liability under the seven months provision, it is argued that if the court should find plaintiff effected a change of domicile to Michigan at any

time within the period, 1943, 1944 and 1945, his income while domiciled in Wisconsin should be taxed and not that received subsequently, in accordance with Sec. 72.09 (2) Wisconsin Statutes 1945, and *Greene* v. *Tax Commission* 221 Wis. 531, 266 N.W. 270.

Plaintiff in his brief, in response to the argument of the Wisconsin Department of Taxation, expressed in its brief as follows: "The facts of his actual maintenance of a home, *his business connections*, the physical location and occupancy by his family of the home in Wisconsin would be the controlling factors", argued under the heading *"Place of Performing Services and Presence in State are not evidence of domicile"*, "Plaintiffs employment by the Northwestern is without evidentiary value because he had a right to continue such employment as a non-resident and without any tax liability. Since liability for taxation of income received for personal services, professions and vocations specifically follows the domicile, the fact of domicile must be determined independently of the place where such services were performed, and it is illogical and erroneous to say that the place of performance is proof of domicile." In support of his claim of right thus stated, he cited *Newport Co.* v. *Tax Commission*, 219 Wis. 293, and *Safe Deposit & Trust Co.* v. *Virginia*, 280 U.S. 83. The argument and these citations fully informed the court that plaintiff claimed the law under which the assessments were made, including the seven months provision if applied to the income of one domiciled in another state, violated the 14th Amendment.

Thus, it is submitted, the constitutional question was effectively raised before and at the trial.

"There are various ways in which the validity of a state statute may be drawn in question on the ground that it is repugnant to the Constitution of the United States. No particular form of words or phrases is essential, but only

that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a while shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented." *Conn. General Life Ins. Co.* v. *Johnson* 303 U.S. 70, 80, 82 L. Ed. 673, 677.

The court was familiar with the decision in *Newport Co.* v. *Tax Comm.* 219 Wis. 293, 261, N.W. 884, and should not have overlooked the principle it announced so clearly applicable to the seven months provision of Sec. 71.01 (1) and should not have overlooked the fact that it was well settled by the state as well as the federal decisions that such provision was invalid for it contravened the provisions of Sec. 1 of the 14th Amendment. It should not be necessary to argue that the provision is unconstitutional, and the rule stated thus in 16 C.J.S. 89 Pg. 183; "One may not be estopped to deny the validity of a statute whose validity has already been passed upon at the instance of other parties" should be applied.

O'Brien v. *Whedock*, 184 U.S. 450, 46 L. Ed. 626. These incidents and the presumption that the assessments were not made in defiance of settled law, and that it was not intended to deprive plaintiff of his constitutional rights thereby, clearly show that the seven months provision was not involved in the issues, and that the attempt to justify the assessment by it first appeared in the case by the opinion of the Circuit Judge long before the statutory decision of the case by the court's findings of fact and conclusions of law. (See Sec. 270.33 Wis. Statutes).

Promptly upon the filing of that opinion, plaintiff filed a written motion that the trial court "grant a rehearing or that the court reconsider" its decision to uphold the assessments as justified by the seven months provision of Sec.

71.01 (1) though plaintiff was held to be domiciled in Michigan, and in such written motion, after argument that the provision could not constitutionally be construed as more than a disputable presumption, it was stated: "But even if the section were applicable under the facts proven, and even if the legislature had intended to create a conclusive presumption and indisputable liability to taxation within the state, it would be invalid and violative of the Fourteenth Amendment of the Constitution of the United States." And the motion after citing numerous other cases, said: "The question was finally and absolutely determined by our court in *Newport Co.* v. *Wisconsin Tax Commission*, 219 Wis. 293, 261 N.W. 884 and the more recent case of *Briggs & Stratton Corp.* v. *Wisconsin Department of Taxation*, 248 Wis. 160, 21, N.W. 2d 441."

Under the circumstances, this raised the constitutional question in proper time, in the trial court long before its statutory decision of the case.

Consolidated Coal Co. v. *Illinois*, 185 U.S. 203, 206, 46 L. Ed. 872, 875, in which it is held: "While the constitutionality of the law was not specifically set up and claimed before the trial in the Circuit Court, there was a motion made in arrest of judgment, in which the invalidity of the statute was specially set up upon the ground of its repugnancy to the 14th Amendment to the Constitution. The motion was denied, although the Supreme Court did not in terms pass upon the Federal Constitutionality of the law. But this was a sufficient presentation of the Federal Question."

National Mutual Building and Loan Association v. *Brahan*, 193 U.S. 635, 646, holds that a notice of a motion made by defendant after plea of the general issue to amend it to set up a federal question, which was denied, could not be considered as though he had "attempted to inject a

federal question into the record," and that whether the motion was granted or denied it was very clear that plaintiff in error was entitled to claim rights under the Federal Constitution by request for a directed verdict. "And if the rights asserted actually existed, plaintiff in error was entitled to an instruction directing a verdict in its favor."

There is no law, rule or practice in Wisconsin that prescribes the time or manner of raising the question of the constitutionality of the law involved in the issues. The law applicable must be principles of the common law as stated by the Supreme Court of the state. Such principles are summarized from earlier cases in the very recent (1949) case of *Wendtland* v. *Industrial Commission*, 256 Wis. 62, 39 N.W. 2d 854: "The point is attempted to be made that respondent did not make a timely challenge of the constitutionality of the Act. Constitutional rights of a citizen are not to be lightly regarded. Those rights were acquired at too great a cost and their value to our democracy is too important to be left to chance or to depend upon some non-essential technicality. The *mere element of time is not controlling.* (Emphasis supplied.) We do not find any hard-and-fast rules defining a waiver of constitutional rights, privileges and immunities that go beyond what is necessary to properly decide the cause at issue. It is more in accordance with judicial duty to determine such matters upon a view of the particular rights asserted and denied."

The Wisconsin cases uniformly hold, in harmony with common law definition and principles that an *intention to waive a known right* must be proven and found, unless the intention is presumed as a matter of law.

Wendlandt v. *Industrial Comm.*, 39 N.W. 2d 854, 256, Wis. 62

Nelson v. *Caddo-Texas Oil Lands Co.*, 176 Wis. 327, 329

Boston Store v. *Katz*, 153 Wis. 492, 526
J. I. Case Threshing Machine Co. v. *Johnson*, 152 Wis. 8, 10.

The Supreme Court of Wisconsin in this case, in disposing of the question of waiver, stated: "In accord with the rules that 'the constitutionality of a statute cannot be raised for the first time in an appellate court of a state or upon rehearing in a civil case' 11 Am. Jur. 772, we have held that 'It is well settled that constitutional rights as well as any other personal or property rights may be waived' ". It appears from the decisions cited to the text quoted that it refers solely to motions for rehearings after final decisions in appellate courts, and is not applicable to a motion in the trial court.

The decision of the Supreme Court of Wisconsin in this case is not supported by any authority and is inconsistent with and contrary to the settled laws of the state, and should not and may not control the decision of the Supreme Court of the United States on the question of waiver.

As said in the opinion of *Union Pac. RR Co.* v. *Public Serivce Comm.* 248 U.S. 67, 69; 63 L. Ed. 131, 132: "It is argued that a decision on this ground (waiver by alleged voluntary application to the Comm.) excludes the jurisdiction of this Court. But the later decisions show that such is not the law, and that, on the contrary, it is duty of this court to examine for itself whether there is any basis in the admitted facts, or in the evidence when the facts are in dispute, for a finding that the Federal right has been waived."

As this court has said in *Lawrence* v. *State Tax Commission*, 286 U. S. 276, 282:

> "But the Constitution, which guarantees rights and immunities to the citizen, likewise insures to him the privilege of having those rights and privileges judi-

cially declared and protected when such judicial action is properly invoked. Even though the claimed constitutional protection be denied on non-federal ground, it is the province of this Court to inquire whether the decision of the state court rests upon a fair or substantial basis. If unsubstantial, constitutional obligations may not be thus avoided."

Other cases: *Truax* v. *Corrigan*, 257 U.S. 312, 66 L. Ed. 254, 259. *Carter* v. *Texas*, 177 U.S. 442; 44 L. Ed. 839. *Davis* v. *Wechsler*, 263 U.S. 22, 68 L. Ed. 143. *Davis* v. *O'Hera*, 266 U.S. 314, 318, 69 L. Ed. 303, 307.

Even if plaintiff was in error in concluding that the seven months provision of Sec. 71.01 (1) was not involved in the issues, he certainly believed it was not and was induced to believe so by the conduct of the Wisconsin Department of Taxation. In fact the failure on the part of the Department and the Assessor of Incomes who made the assessments (who was present at the trial and a witness) to claim the assessments were made under authority of that provision or were justified by it when they knew plaintiff was acting on the assumption that the provision was not involved in the issues, was not an exercise of good faith, if later they should claim it was involved. It is the rule in such case, in harmony with the definition of waiver, that there will be no waiver of constitutional rights if the constitutional question is raised when the error is first revealed, even though it may be in a motion for rehearing in the appellate court. Therefore the claim of unconstitutionality of the statutes was timely made after the opinion of the trial court disclosed that the unconstitutional provision of the statute was relied upon.

International Steel & Iron Co. v. *National Surety Co.*, 297 U.S. 657, 665, 80 L. Ed. 961. *Safe Deposit and Trust Co.* v. *Virginia*, 280 U.S. 83.

Still another reason for holding that the question and claim were timely presented in the Circuit Court and that plaintiff was improperly deprived by the state courts of the protection of the Constitution, is that the Circuit Court did actually reconsider the question of the unconstitutionality of the provision, and thereupon it was its duty to decide the question correctly and not to avoid it.

The Circuit Court did reconsider the question when it urged counsel for the Department of Taxation to furnish a brief in reply to plaintiff's motion and argument as to the invalidity of the provision, and gave him nearly ten months time to prepare it. After ten months consideration of the question he furnished a brief in which he attempted to justify the court's views as to the constitutionality of the seven months provision, but did not claim any waiver of constitutional rights on the part of plaintiff. The court after considering the briefs and necessarily the constitutional question for 55 days, asserted the claim of waiver, and thus avoided a direct decision of the question submitted to it.

Finality of the Judgment of the Wisconsin Supreme Court

Later, the Circuit Court made and entered Findings of Fact and Conclusions of Law, constituting its decision (Wis. Statutes Sec. 270.33) and directing judgment in accordance with the earlier opinion, dismissing plaintiff's action on the ground that he was liable to the assessments by virtue of the seven months provision of Sec. 71.01 (1), and thereupon judgment was entered accordingly. Appellant appealed from such judgment to the Supreme Court of Wisconsin, the court of final resort. Upon such appeal in oral argument and in briefs, plaintiff-appellant renewed his argument that said provision contravened the Fourteenth Amendment and his rights guaranteed by it, and that he

had not waived his right to the protection of it, and cited many decisions in support of his claims.

By its decision filed November 8, 1950, the Supreme Court of Wisconsin affirmed said judgment of the Circuit Court. Plaintiff-appellant moved for a rehearing in the Supreme Court in accordance with the Wisconsin statutes, and again renewed his claims, particularly that there had been no waiver of his right to the protection of the 14th Amendment. The Supreme Court denied a rehearing January 9, 1951, which was the final judgment of that court. Under the Constitution and Laws of Wisconsin, appellant had no other remedy.

The Constitutional Questions Are Substantial

The questions involved in this appeal are not only of great importance to the appellant, now and in the future, but of great importance to thousands of citizens of the United States who will pass temporarily from their homes and domiciles to the large industrial cities of other states, to engage in the present defense work, just as they did in the last World War. It is important to them, as it is to appellant, to know whether entering the State of Wisconsin, or any other state, for the discharge of such duties and performance of such work will be burdened by unlawful taxation; whether their constitutional right to do so may be abridged or denied by abuse of the taxing powers. Corporations are also frequently confronted with the question presented herein when requiring its apprentices, employees or officers to go from factory to factory in different states for varying periods of time, or with varying degrees of regularity. In fact the question is of great importance to every citizen, for any citizen may at any time find it necessary to exercise fundamental rights secured by the 14th Amendment, in a state other than that of his domicile. The

question is substantial not only because it involves double taxation and the wrongful exaction of large sums of money from citizens of the United States, as a condition to the exercise of rights secured by the Constitution, but also because of the importance of the free exercise of those rights to the enjoyment of liberty and good government, and because of the duty of the Government to preserve those rights for the enjoyment of its future citizens and to secure them for the benefit of all its citizens now.

Respectfully submitted,

LOUIS QUARLES,
Counsel for Plaintiff-Appellant.

NORMAN J. BAKER,
Counsel for Plaintiff-Appellant.

APPENDIX A

Index to Appendix A

	Page
Judgment of the Supreme Court of the State of Wisconsin	23
Decision of the Circuit Court of Milwaukee County, dated 25th October, 1948	28
Decision of Circuit Court of Milwaukee County dated 19th October, 1949	39
Findings of Fact and Conclusions of Law of Circuit Court of Milwaukee County dated 13th day of December, 1949	44
Judgment of Circuit Court of Milwaukee County, dated —— —— 1949	48
Amended Complaint	48
Answer to Amended Complaint	54

IN SUPREME COURT, STATE OF WISCONSIN

August Term, 1950

No. 55

NORMAN L. BAKER,
Plaintiff-Appellant,

v.

JOHN H. LEENHOUTS, WISCONSIN DEPARTMENT OF TAXATION, AND GEORGE M. HANLEY, SHERIFF,
Defendants-Respondents.

Filed Nov. 8, 1950. Arthur A. McLeod, Clerk of Supreme Court, Madison, Wis.

Appeal from a judgment of the circuit court for Milwaukee county, Charles L. Aarons, circuit judge. *Affirmed.*

This is an action in equity commenced in October, 1947 by which the plaintiff seeks to enjoin collection of income tax assessments levied against him upon his assumed income for the years 1943, 1944 and 1945.

The trial judge found among other things (1) that during the years in question plaintiff was domiciled in Michigan and did not maintain a permanent place of abode in Wisconsin; (2) that he spent in the aggregate more than seven months of each of the years within Wisconsin; (3) that he received income from personal services and intangible personal property during each of the years; (4) that he made no income tax returns or report to the authorities of Wisconsin during any of the years; (5) that upon due notice and in accordance with the provisions of paragraph (a) of subsections (4), (6) and (7) of sec. 71.09 Stats. the Assessor of Incomes for the Milwaukee district, in which plaintiff had spent his time in Wisconsin made assessments against him on his income for said years, and (6) that plaintiff did not in any of the pleadings or at the trial in any way challenge or contest the validity of the provisions of sec. 71.01 Stats. and particularly the pro-

vision that any natural person who spends in the aggregate more than seven months of the income year within Wisconsin shall be deemed to be residing within the state for purposes of determination of liability for income taxes and surtaxes, or assert that said provision is invalid or unconstitutional. Judgment dismissing the action was entered on December 31, 1949, from which this appeal.

GEHL, J. Plaintiff failed to make Wisconsin income tax returns for 1943, 1944, and 1945. The Assessor of Incomes, acting pursuant to the provisions of sec. 71.09, Stats. 1945, gave due notice to him that unless he made such returns within a specified time "doomage" assessments of income taxes would be made against him. The "doomage" assessments were made. Sec. 71.09 provides:

"71.09. Power of assessment; filing returns; penalties. (1) * * *

"(2) * * *

"(3) * * *

"(4) (a) Whenever in the judgment of the assessor of incomes any person other than a corporation shall be subject to income tax in his district under the provisions of this chapter, he shall notify such person to make report to him on or before March fifteenth of each year in such manner and form as the department of taxation shall prescribe, specifying in detail the amounts of income received by him from all sources, together with the amounts of income received by his dependents, his wife and each child under 18 years of age residing together with him as members of the family, and such other information as the department shall deem necessary to enforce the provisions of this chapter. * * *

"(b) * * *

"(c) * * *

"(5) * * *

"(6) In case of the failure on the part of any person to make a report of income within the time and in the manner prescribed by law, the department of taxation or assessor of incomes may enter an assessment against said person upon 10 days' notice in writing in a sum of not less than $500. Such notice may be served by mail. After the tax

on such assessment has been entered on the assessment roll the person assessed shall be forever barred from questioning the correctness of the same in any action or proceeding." * * *

As has been stated, the trial judge found that plaintiff spent in the aggregate more than seven months of each of the years in question in Wisconsin, and concluded that therefore he was to be deemed to be residing within the state for the purposes of determining liability for income taxes and surtaxes. The assessments were authorized by the provisions of sec. 71.01 Stats., the material portions of which are:

"* * * every other natural person who . . . spends in the aggregate more than seven months of the income year within the state, shall be deemed to be residing within the state for the purposes of determining liability for income taxes and surtaxes. * * *"

Plaintiff challenges the finding. The trial judge in his memorandum opinion discusses in some detail the evidence and circumstances which prompted the finding. His analysis, which describes in a general way the nature of plaintiff's testimony which bears upon his claim that he spent more than five months of each year outside the state, and a thorough examination of the record convinces us that there is ample support for the finding. The learned trial judge said:

* * *

"It is quite apparent from the entire testimony of plaintiff that he so construed the seven months provision of section 71.01 as to make necessary or appropriate a mathematical computation of the exact number of days during which he was physically absent from the State of Wisconsin in order to determine the fact as to whether he 'spends in the aggregate more than seven months of the income year within the state'."

"I am of the opinion that such method of computation is not contemplated by the statute in question. Pleasure trips with his wife at week ends and business trips by the plaintiff on behalf of his employer should not be excluded from the

time 'spent' in the State of Wisconsin. In making such trips the plaintiff always intended, after attaining the objective of the trip, to return to his headquarters which were unquestionably in Milwaukee. I am of the opinion that where one spends most of the 'weekdays', that is, from Monday to Friday, (except his vacation periods) in a place where he has all of his business activities that he thereby 'spends' in the aggregate more than seven months of the income year within the state. * * * "

Plaintiff contends that the provisions of sec. 71.01 Stats. are unconstitutional and invalid and that he did not waive such claim. The plaintiff served and filed a complaint and two amended complaints. No question as to the constitutionality of the statute was raised in either of the pleadings, nor was there such claim made in plaintiff's briefs prior to the original decision of the Court. No mention of such claim was made until upon "plaintiff's motion for rehearing in respect to the effect of Section 71.01 Wisconsin Statutes" he filed a brief in which he raised the question. He offers as one of the reasons for his failure to make such claim earlier the assertion that he was "so satisfied that the question was so settled that the provision was invalid and unconstitutional that he considered it unnecessary . . . to present any argument to that effect to the Circuit Court," and cites *Newport Co.* v. *Wis. Tax Comm.*, 219 Wis. 293, 261 N.W. 884 as establishing the invalidity of the statute. That case related to the taxation of the income of a corporation which is not a natural person. It is not applicable here. If his contention as to the invalidity of the statute might otherwise be considered the reason given for his failure to raise the question does not suffice.

In accord with the rule that "the constitutionality of a statute cannot be raised for the first time in an appellate court of a state or upon a rehearing in a civil case," 11 Am. Jur. 772, we have held that,

"It is well settled that constitutional rights, as well as any other personal or property right, may be waived (citing cases)."

Booth Fisheries Co. v. *Industrial Comm.*, 185 Wis. 127, 200 N.W. 775.

"It is the duty of a person who claims that an ordinance invades rights guaranteed by the constitution to raise that question at his earliest opportunity."

Hayes v. *Hoffman*, 192 Wis. 63, 211 N.W. 271.

Plaintiff contends that because sec. 71.01 Stats. confers no benefit upon him and he sought none under its provisions he is not now estopped to assert its invalidity and cites *Wendlandt* v. *Industrial Comm.*, 256 Wis. 62, — N.W. —. Language is used in the opinion filed in that case which would seem to support his claim, but it should be observed that in that case the court pointed out that "the record does disclose that the unconstitutionality of the act was directly and positively asserted early and, certainly, as soon in the proceedings as it could be submitted to a judicial tribunal." That is not the case here. As we have pointed out, plaintiff did not assert his claim of the invalidity of the statute until after all of the issues had been determined in the trial court.

Plaintiff's contention that because the statute confers no benefit upon him and he sought none under its provisions he is not precluded from his attack upon its validity assumes that the department relies upon the rule of estoppel. The department invokes the doctrine of waiver, not estoppel, and we agree that there has been a waiver which requires denial of the relief sought.

The determination of the issues here considered makes it unnecessary for us to determine the other matters treated by counsel.

By the Court.—Judgment affirmed.

Filed April 2, 1951. Arthur A. McLeod, Clerk of Supreme Court, Wisconsin

THE DECISION OF THE CIRCUIT COURT

October 25, 1948

Chas. L. Aarons, Judge

[Title omitted]

This is an action in equity in which the plaintiff demands judgment enjoining the collection of the income tax assessments levied against the plaintiff upon his assumed income for the years 1943, 1944 and 1945. The plaintiff having failed to file income returns for said years, the Assessor of Incomes proceeded to levy assessments under sec. 71.09(6).[1]

The sole question raised by the plaintiff is whether he was liable to income taxation in Wisconsin for income received by him during any of said three years. He asserts nonliability for such income in Wisconsin on the ground that he was not a resident of, or taxpayer in, Wisconsin during such period, and that his domicile was and is at Beulah in the State of Michigan; that he therefore was not obliged to make and file any income returns to the tax authorities of the State of Wisconsin.

After the assessment (for the income years of 1943 and 1944) had been made by the Assessor pursuant to sec. 71.09(6), the plaintiff made application under 71.12 "for the abatement of such assessment and the tax."

As his reason for such application the plaintiff stated:

> "I represent as my reason for such application that I did not at any time in said years reside within the State of Wisconsin; that at no time during either of said years was I domiciled in said State; that I maintained no permanent place of abode in said State in either of said years; that I did not spend in the aggregate more than seven (7) months of either of said years in said State; and that during the whole of each of said years I resided and was domiciled at the Vil-

[1] All statutory section numbers cited herein are those of the 1945 statutes.

lage of Beulah, in the State of Michigan and there maintained my permanent home and place of abode; that I had no income derived from property located or business transacted within the State of Wisconsin; and no income subject to income taxation in said State, in either of said years." (Exhibit 7)

Because the assessments had been levied under sec. 71.09(6) and not under sec. 71.12, pertaining to "additional assessments," the Assessor informed the plaintiff that the assessments made and the taxes based thereon were not subject to further correction, review or appeal. (Exhibit 11)

The defendants contend (1) that this action is barred by the terms of sec. 71.09(6); (2) that the facts do not establish domicile of plaintiff to be outside of Wisconsin during the years involved; (3) that the facts do not establish that the plaintiff was a nonresident of this state during the years involved.

The plaintiff contends that he can not be precluded from proceeding in equity because the Wisconsin statutes do not provide any remedy, administrative or judicial, by way of reviewing a so-called "doomage" assessment made under sec. 71.09(6); and that if the statute were to be so construed as to authorize such assessment against a nonresident of the State of Wisconsin who fails to file a return of income without provision for a hearing before some tribunal, the statute would necessarily fall as unconstitutional.

The response of the defendants to this latter contention is to the effect that the plaintiff has failed to exhaust the administrative remedy which, they contend, has been provided by the statute in that he was required to file an income return; and that if he had done so certain administrative procedure under sec. 71.12 would have been applicable; and that having thus failed to file a return, he may properly be barred from seeking any remedy in the courts.

I have reached the following conclusions on the various contentions of the parties:

I

The failure of the plaintiff to make and file an income return and the Assessor's action under sec. 71.09(6) does

not operate to bar the present action. If it did so operate, it would require him—claiming to be a nonresident and not bound to submit himself to the state's jurisdiction—to do the very thing which he contends he is not bound to do and which, if he so complied, would make him liable to assessment. It is held that if he files a return he assesses himself and has no right thereafter to a court review to correct any error he may have made in his self-assessment.

Whitbeck v. Wisconsin Tax Comm., 207 Wis. 58, 67, 68, 80 A. L. R. 373, 378.

The fact that plaintiff may not ultimately prevail in his contention that he is not domiciled in or is not a resident of Wisconsin does not operate to compel him initially to waive his right to contest the question of his domicile or residence.

The making of an income tax return, which under the *Whitbeck* case would operate to prevent a court review (on his petition) of the initial assessment, can in no sense be regarded as the first and essential step of an "administrative remedy" as argued by the defendants' counsel. This I consider so obvious as not to require further discussion.

There being no other method of review provided in the statutes, the plaintiff is properly in court in the present equitable action.

II

Except as to income of nonresidents derived from property located, or business transacted, in this state, the basis of assessment of the Wisconsin Income Tax is *residence* within this state. (Sec. 71.01) That statute defines what is included within the scope of the term "residing in this state." It provides:

> "Every natural person domiciled in the state of Wisconsin, and every other natural person who maintains a permanent place of abode within the state or spends in the aggregate more than seven months of the income year within the state, shall be deemed to be residing within the state for the purposes of determining liability for income taxes and surtaxes."

The statute properly assumes that there is a distinction between legal "domicile" and "residence," although the two terms are generally used as equivalents. See: *Restatement on "Conflict of Laws,"* Chapter 2, particularly sections 9 to 12, inclusive; *In re Village of Chenequa,* 197 Wis. 163, 168; 28 *Corpus Juris,* Sec., p. 5 (Domicile § 2). The distinction between residence and domicile is well stated in *Cooper's Adm'r v. Commonwealth* (Va.), 93 S. E. 680, at page 683. See *Penfield v. Chesapeake, etc., Co.,* 134 U. S. 351, 356-357, 33 L. Ed., 940, 943-944, where the court said:

> "The domicile of the citizen may be in one state or territory, and his actual residence in another."

See also:

District of Columbia v. Murphy, 314 U. S. 441, 454-455, 86 L. Ed. 329, 337.

1. *As to Domicile*

The first element in the above quoted statutory definition is "domicile." The matter of plaintiff's domicile has been litigated in income tax cases in this state involving plaintiff's income received in previous years.

Baker v. Dept. of Tax, 246 Wis. 611 (involving the year 1941);

Baker v. Dept. of Tax, 250 Wis. 439 (involving the year 1942).

In each of those cases the circuit and supreme courts affirmed findings of the Wisconsin Board of Tax Appeals to the effect that plaintiff had not established the fact that he had abandoned his domicile in Wisconsin and established a new domicile in Michigan.

In the last case (250 Wis. 439) involving the 1942 income taxation, it appeared that evidence was adduced on behalf of the plaintiff showing some facts additional to those which were disclosed by the evidence in the previous case, but it was said: "The additional facts are not of sufficient consequence to overcome the board's finding upon the other evidence" (*Id.* 440).

In the instant case evidence was received of a number of additional facts having a bearing on the subject matter of plaintiff's domicile. In August 1942 plaintiff submitted to the Wisconsin Department of Taxation a written declaration of residence in which he stated facts from which it prima facie appears that he intended his domicile to remain in Beulah, Michigan (Exhibit 1). While that was a mere declaration, it was followed by his registration as a voter in Michigan in June or July 1943 and by actually voting at elections for state and county offices in Michigan not later than 1944. Each of at least two registrations required an affidavit by the plaintiff to the effect that he was a resident of the state of Michigan. In his Federal income returns during the years involved his domicile was likewise represented to be at Beulah, Michigan.

A number of the facts shown in the evidence in support of plaintiff's claim of a Michigan domicile are the same as, or similar to, those testified to in the previous cases above referred to. The exact quantum and character of evidence and the precise amount (in time or frequency) of plaintiff's physical presence in his Michigan home cannot be determined for future years by the evidence produced in respect to former years. Nor is it contended that this court, trying the facts on the evidence in this case, must be bound by findings of other tribunals based on evidence submitted to them, even though the evidence is quite similar. The persistent continuity of certain acts of the plaintiff from year to year in seeking in good faith to establish a domicile in another state should be accorded some weight. If that were not true he could be deprived of a fundamental right to change his domicile as long as he had any occasion to transact business, or spend time, in Wisconsin.

The argument is made by defendants' counsel that plaintiff's testimony respecting registration and voting is vague and uncertain as to time. While it lacks precision as to actual dates, the court can not discredit the testimony for that reason. The plaintiff is a lawyer of many years of experience. In exercising the right of suffrage in Michigan he must realize the solemnity of the act. It must be assumed that he fully understands the seriousness of the exercise of

the right of suffrage and of the making of any false affidavit respecting thereto. The presumption is in favor of his honesty and good faith in thus acting to choose a new domicile.

In *Cooper's Adm'r v. Commonwealth*, 93 S. E. 680, 683 (Va.), the court said:

> "In doubtful cases particular significance should be attached to the repeated exercise of the right to vote, because this right depends upon citizenship and domicile, and must be generally, if not universally, supported by the oath of the voter. Its unlawful exercise subjects him to prosecution both for illegal voting and for perjury if he swears falsely, and such act is a distinct, unequivocal, and public assertion by the voter of his legal domicile."

And see comments of Justice *Crownhart*,
In re Village of Chenequa, 197 Wis. 163, 167, 168.

While there are facts pertaining to plaintiff's occupations, activities, business and physical presence in the city of Milwaukee which make this a close case on the question of domicile, I am of the opinion that in such a case a declaration of intention, such as was made by the plaintiff in August 1942, and designated herein as Exhibit 1, followed up by his registration as a voter and actual exercise of the voting privilege in the State of Michigan, are elements of a strongly persuasive, if not controlling, character. *Mitchell v. U. S.*, 21 Wall. (U. S.), 350, 353, 22 L. Ed. 584, 588. A more recent case refers to the act of voting as "highly relevant but by no means controlling." *District of Columbia v. Murphy*, 314 U. S. 441, 456, 86 L. Ed. 329, 338. The Attorney General of this State has recognized that such acts are sometimes the "determinative factor."

(32 *Ops. Atty. Gen.*, 92, 94.)

This principle, as applicable to voting, has been placed in statutory form in this State by sec. 6.51(10), Wis. Stats., which provides:

> "If a person shall go into another state and while there exercise the right of a citizen by voting, he shall

be considered and held to have lost his residence in this state."

Considering plaintiff's exercise of such political rights as a "highly relevant" fact in connection with his acts bearing upon his establishment and occupancy of the home in Beulah, Michigan, and his other conduct, as detailed in the record, pertaining to his manner of living both in Wisconsin and Michigan, and his declarations and acts since 1941 by which he sought to establish his domiciliary status in Michigan, I am satisfied from the evidence that during the years here involved the plaintiff's principal establishment, regarded by him as his permanent home—his domicile—was at Beulah in the State of Michigan.

2. *As to permanent place of abode.*

The statute above quoted (71.01) provides that in addition to those persons who are domiciled in Wisconsin

> "every other natural person who maintains a permanent place of abode within the state" * * * "shall be deemed to be residing within the state" etc.

Evidence was produced as to where plaintiff stayed while in Milwaukee; as to where he kept his clothing and baggage; as to his rooming arrangement at the Summit Avenue house where he formerly resided, and which was occupied, during the years here involved, by married members of his family including his wife, and frequently (as hereinafter indicated) by himself. In the light of all the evidence, which need not be detailed, I cannot find that the plaintiff maintained "a permanent pace of abode" in Wisconsin.

3. *As to the seventh months' provision.*

In addition to those persons domiciled in Wisconsin, and those others who maintain a permanent place of abode within the state,

> "every other natural person who" * * * "spends in the aggregate more than seven months of the income year within the state, shall be deemed to be residing

within the state for the purposes of determining liability for income taxes and surtaxes."

There is considerable evidence respecting the number of days—and even fractions of days—during which the plaintiff was physically absent from the State of Wisconsin. These absences, excepting certain periods in the summer months which were spent in Beulah, Michigan, were of two kinds. At week ends, that is from sometime during Friday until the following Monday morning, the plaintiff and his wife frequently went to Chicago on a pleasure excursion. At other times the plaintiff and his wife would take a week end trip to Beulah, Michigan. At various times the plaintiff took business trips out of the state on behalf of his employer, the Northwestern Mutual Life Insurance Company. For a time the plaintiff kept entries in the form of a diary respecting the various trips taken by him outside of the state. Later, and after the decision in one of the previous cases, he discontinued that practice.

On direct examination he testified as his conclusion that during the three years involved he spent "much less than the seven months here and spent more in days outside of the State—much more than the five months out of Wisconsin." He gave many details on cross examination. In his testimony he estimates that a correct average of the number of nights that he slept at the Summit Avenue residence in Milwaukee was not more than three and half a week. There were, however, other nights when he slept at his Second Street building office.

It appears that usually during the three years involved the plaintiff was in Milwaukee from Monday morning until late Friday afternoon, although there were times when he took the noon boat on Friday to go to Beulah, Michigan. His main occupation was that of an assistant general counsel for the Northwestern Mutual Life Insurance Company. For that purpose he had an office in the building of that life insurance company in Milwaukee. His other activities of a business nature involved his work as a trustee of a building known as the Madison Building, otherwise known as the Second Street Building. He had an office in that building in the city of Milwaukee for the purpose of

transacting his office business as such trustee. There, he testified, he wrote "hundreds of letters." He also had other business activities in this state in connection with the handling of a family trust in which he and his wife were trustees. This trust handled a variety of securities, including real estate bonds. He also received compensation of $1,500 a year from the Downing Box Company of Milwaukee (whose attorney he had formerly been) but without performing any active services during the years here involved except that he was a director of the company.

The plaintiff's wife filed her income tax returns during the years in question with the Assessor of Incomes at Milwaukee. The plaintiff had nothing to do with the making of her returns but he stated that he had seen returns of Mrs. Baker in which she gave her address as Summit Avenue, Milwaukee, stating at the same time that her husband, the plaintiff, was a nonresident. Mrs. Baker usually took the pleasure trips with her husband to Chicago at week ends, and also made the trips with her husband when he went to Beulah, Michigan.

The plaintiff stated that he made no claim that he and Mrs. Baker had separate residences or domiciles. He added: "The fact is that she submitted her return here because she didn't want to be obliged—as I thought the law was—to be in Wisconsin five months of the—or to be out of Wisconsin five months of the year."

It is quite apparent from the entire testimony of plaintiff that he so construed the seven months' provision of section 71.01 as to make necessary or appropriate a mathematical computation of the exact number of days during which he was physically absent from the State of Wisconsin in order to determine the fact as to whether he "spends in the aggregate more than seven months of the income year within the state."

I am of the opinion that such method of computation is not contemplated by the statute in question. Pleasure trips with his wife at week ends and business trips by the plaintiff on behalf of his employer should not be excluded from the time "spent" in the State of Wisconsin. In making such trips the plaintiff always intended, after attaining the

objective of the trip, to return to his headquarters which were unquestionably in Milwaukee. I am of the opinion that where one spends most of the "weekdays," that is, from Monday to Friday (except his vacation periods), in a place where he has all of his business activities that he thereby "spends" in the aggregate more than seven months of the income year within the state.

As above indicated, the right of the State to levy an income tax is based primarily upon residence in Wisconsin. Under our statute to be domiciled in Wisconsin is "deemed" residence. But even though domiciled elsewhere, to maintain a permanent place of abode, or to spend in the aggregate more than seven months of the income year within the State, shall be *deemed*[2] to be residing within the State for the purposes of determining income tax liability. On the basis of such residence alone, income taxation may be sustained by virtue of the Wisconsin statute. Its constitutionality has not been challenged.

It must be found that the plaintiff did, within the meaning of sec. 71.01, Wis. Stats., spend in the aggregate more than seven months of each of the income years here involved in the State of Wisconsin; and that he must therefore be deemed to be residing within the State of Wisconsin during such period, notwithstanding the fact that his legal domicile was in Michigan during such period. (As to distinction between "domicile" and "residence" see *ante* p. 4.)

III

There is some discussion in plaintiff's brief pertaining to the inadequacy of the notices given by the Assessor of Incomes to the plaintiff pursuant to sec. 71.09(6). Complaint is made that the proposed amount of the assessment was not stated in such notices. (Exhibit 5 (October 29, 1945) pertaining to the income years 1943 and 1944, and Exhibit 15 (February 17, 1947) pertaining to the income year 1945.)

The earlier notices were to the effect that the Assessor would proceed in accord with sec. 71.09 (6) (Exhibit 5) or

---

[2] The word "deemed" was substituted for "presumed" by Chapter 544, Laws of 1935.

in accord with Chapter 71 (Exhibit 15) to "levy an assessment" unless the return be filed. The later notices were to the effect that the assessments have been "levied" and that they "will be entered on the * * * tax roll." The later notices state the amounts of the assessments as estimates of plaintiff's income. The statute (71.09(6)) requires ten day's notice of the *entry* of such assessments.

As to the various meanings of the word "levy" in tax statutes see:

Borner v. *Prescott*, 150 Wis. 197, 203-204;

Petition of Wausau Inv. Co., 163 Wis. 283, 288.

Whether or not the later notices referred to (Exhibits 6 and 16) are adequate to meet plaintiff's objection need not be determined in this case. Neither the original complaint nor the first or second amended complaints filed in this action contain any allegation to the effect that the notice given under sec. 71.09(6) was defective in the respect named. On the other hand, each of said complaints relies solely upon the contention that the plaintiff was not obliged to make or file any income return to the tax authorities because of the alleged fact that he was not a resident of, or taxpayer in, the State of Wisconsin during the years in question.

Attention is also directed to the fact that the transcript of the testimony taken in this action contains a statement made by plaintiff's counsel when an objection was made by him to a question pertaining to the amount of the income derived from a certain trust. That statement reads as follows:

> "Mr. Norman J. Baker: I will object to that again as immaterial. There is a particular assessment in question with the issues raised as to whether he is domiciled in Wisconsin. There is not any question about over—or under—payment of the tax. The amount of the tax is not in question."

It thus appears to be unnecessary to consider any question pertaining to the omission of the proposed amount of the assessment from the notices (Exhibits 5 and 15) given

by the Assessor of Incomes to the plaintiff pursuant to sec. 71.09(6).

Findings of fact and conclusions of law pursuant to the foregoing memorandum may be presented. Judgment should be granted in favor of the defendant dismissing the complaint with the usual costs.

(s) CHAS. L. AARONS, *Circuit Judge.*

Dated at Milwaukee, Wisconsin this 25th day of October, 1948. Cover.

DECISION ON PLAINTIFF'S MOTION FOR REHEARING

Oct. 19, 1949.

Chas. L. Aarons, Judge.

[Title omitted]

The court's decision in this matter, dismissing plaintiff's complaint and granting judgment in favor of the defendant, was filed October 25, 1948. Thereafter plaintiff's counsel transmitted to the court a brief designated "Plaintiff's Motion for Rehearing in Respect to the Effect of Section 71.01, Wisconsin Statutes." Briefs from counsel for both parties were later received by the court, the final one having been submitted on August 25, 1949.

The plaintiff's brief on such motions deals solely with that part of this court's decision (beginning at page 9) which discusses and passes upon the "seven months'" provision contained in section 71.01, Wisconsin statutes.

(References to this court's decision of October 25, 1948 will be hereinafter referred to by the letter "D".)

Section 71.01, Wis. Stats., 1945, reads as follows:

> "71.01 *Persons and subjects taxable.* There shall be assessed, levied, collected and paid a tax on all net incomes as hereinafter provided, by every person residing within the state or by his personal representative in case of death; and by every nonresident of the state, upon such income as is derived from property located or business transacted within the state, except as here-

inafter exempted. Every natural person domiciled in the state of Wisconsin, and every other natural person who maintains a permanent place of abode within the state or spends in the aggregate more than seven months of the income year within the state, shall be deemed to be residing within the state for the purposes of determining liability for income taxes and surtaxes. This section shall not be construed to prevent or affect the correction of errors or omissions in the assessment of income of former years in the manner provided in sections 71.10 and 71.11."

The proposition presented by plaintiff in his brief is that the words "residing within the state" (in sec. 71.01) must be construed the same as if the words "domiciled within the state" were used; and that if construed as authorizing an income tax upon the net income (from intangibles) of persons "residing in this state" whose domicile was elsewhere the statute is unconstitutional.

(*Newport Co.* v. *Tax Comm.*, 219 Wis. 293;
and other cases cited in plaintiff's brief.)

In view of such contention a review of the pertinent proceedings in this action is appropriate.

In its decision this court reached the conclusion that the plaintiff's "domicile" during the times involved was in Michigan (D, pages 4 to 8). This conclusion was based primarily upon the fact that plaintiff had voted in Michigan in 1944, after registering as a voter in 1943 following his August 1942 declaration of intention made to the Wisconsin Department of Taxation.

While the words "domicile" and "residence" are often used interchangeably, the Wisconsin statute (71.01) employs language which unequivocally makes a distinction between the two terms (D. page 4). It thus differs from such statutes as the North Dakota statute. In *Schillerstrom* v. *Schillerstrom* (N. D.), 32 N. W. (2d) 106, 114, it is said

"The words 'residence' and 'domicil' are not always synonymous at law, nor are they convertible terms when used accurately. (Citing) But, as used in the

> various statutes, this depends upon the intent of the particular statute as ascertained by the construction of its provisions. Thus, 54-0126 (the North Dakota statute) supra, providing rules for determining residence, uses the term as equivalent to domicil. (Citing) And under the statute with which we are especially concerned, 14-0517, infra, residence is synonymous with domicil."

Since the proper construction of the Wisconsin statute necessarily requires imposition of income taxes upon "every person residing within the state" even though "domiciled" elsewhere (D. 12 to 13), the question now presented is not one of construction but of constitutionality.

This court, assuming the validity of section 71.01, found that the plaintiff came well within the seven months' provision. See D. 12 where the following language is used:

> "I am of the opinion that where one spends most of the 'weekdays,' that is, from Monday to Friday (except his vacation periods) in a place where he has all of his business activities that he thereby 'spends' in the aggregate more than seven months of the income year within the state."

And in D. 13 (commenting upon the seven months' provision of the statute in question):

> "On the basis of such residence alone, income taxation may be sustained by virtue of the Wisconsin statute. *Its constitutionality has not been challenged.*" (Italics added.)

The record discloses that the plaintiff served and filed his original complaint in June 1946; an amended complaint in June 1947; and a second amended complaint in November 1947. An issue was raised in the pleadings (complaint and answer) not only on the question of domicile but also on the question of plaintiff's place of residence.

In all of the plaintiff's complaints the only statute whose validity was attacked was section 71.09(6) (which relates to the making of the so-called "doomage" assessment). No

question was raised as to the constitutionality of section 71.01 either in the pleadings or in the briefs submitted by counsel prior to the decision of this court. The testimony of the plaintiff upon the trial dwelt in detail upon the actual time "spent" by him in the state of Wisconsin during the years in question, upon the basis of which the plaintiff testified to his conclusion that he spent "much less than the seven months here and spent more in days outside of the state—much more than the five months out of Wisconsin." (D. pages 10 and 12; temporary transcript, p. 14.) And with reference to the fact that his wife filed her income tax returns during the years in question with the assessor of incomes at Milwaukee, giving her address as Summit Avenue (Milwaukee), the plaintiff testified that he never made a claim that he and Mrs. Baker had "separate residences or domiciles." He proceeded to explain his wife's filing her income returns in Milwaukee as follows:

> "The fact is that she submitted her return here because she didn't want to be obliged—as I thought the law was—to be in Wisconsin five months of the—or to be out of Wisconsin five months of the year." (D. page 11; temporary transcript, pages 57 and 58.)

It thus appears not only that the issue presently raised as to the constitutionality of the seven months' provision contained in section 71.01 was not raised in any one of the plaintiff's three complaints nor in any of the briefs prior to the decision of this court, but that he industriously sought to bring himself beyond the scope of the seven months' provision by detailed testimony involving mathematical computations as to the time he actually "spent" in the state and out of the state. This was coupled with the testimony above referred to with reference to the residence of his wife (with whom the plaintiff's relations were always amicable), whose reason, as given by the plaintiff, for retaining her residence in Wisconsin was her unwillingness to "be out of Wisconsin" for such period of time as would operate to make her a "non-resident" and thus not subject to Wisconsin income taxation (D. p. 11).

The case is therefore one where the constitutional objection, if such actually exists, has been waived. In *Lewis* v. *The American S. & L. Assoc.*, 98 Wis. 203 at page 227, it is said:

> "There are many well-considered cases sustaining the position that a party may, by his own act or conduct, preclude himself from insisting upon constitutional objections to a statute affecting his rights." *Id.* page 227.

The quotation just given appears with approval in the opinion of *Chief Justice Winslow* in *Leora* v. *Minneapolis etc. R. Co.*, 156 Wis. 386, at page 391, wherein the court also quotes from a New York case to the following effect:

> " 'By failing to raise it (the question of the constitutionality of the act) or to present it in any form for the consideration of the court below, he waived it as effectually as he could have done by express stipulation.' " *Id.* page 391.

See also *Harrington* v. *Downing*, 166 Wis. 582, at 586, where the court quotes from the *Leora* case, particularly from page 392 of the latter case. *Booth Fisheries Co.* v. *Industrial Commission*, 185 Wis. 127, 132, where the court said:

> "It is well settled that constitutional rights as well as any other personal or property right may be waived (Citing Wisconsin cases). The only exception to this principle that we recall is the right of the defendant in a criminal case fo waive a trial by jury."

And see

> *Costigan* v. *Hall*, 249 Wis. 94, 100;
> *State ex rel Wis. Trust Co.* v. *Phelps*, 172 Wis. 147, 154;
> *Hayes* v. *Hoffman*, 192 Wis. 63, 70.

The trial in this action was concluded on January 28, 1948. At no time prior to the presentation of a motion for rehearing in the form of a brief has the matter of the constitutionality of section 71.01 been raised. I have reached

the conclusion that the plaintiff has effectually waived any right which he may have had to raise the question of constitutionality.

Accordingly the court must adhere to its former decision and deny plaintiff's motion to modify the same. Findings of fact and conclusions of law pursuant to the memorandum filed on October 25, 1948 should be promptly presented. Judgment in accordance with such conclusions should be granted in favor of the defendant dismissing the complaint with the usual costs.

CHAS. L. AARONS,
Circuit Judge.

Dated at Milwaukee, Wisconsin this 19th day of October, 1949.

Cover.

Findings of Fact and Conclusions of Law

[Title omitted]

This action having come on for hearing for trial at the January (1948) term of said court and having been tried before the court on the 26th day of January, 1948, Norman J. Baker, appearing for the plaintiff and the Attorney General of Wisconsin by Harold H. Persons, Assistant Attorney General and William J. McCauley, District Attorney, Milwaukee County by Oliver L. O'Boyle, Corporation Counsel, appearing for the defendants; and after hearing the allegation and proof of the parties, the arguments of counsel, and being advised in the premises, now pursuant to the written decisions of this Court filed on October 28, 1948, and October 19, 1949,

I hereby make and file the following Findings of Fact and Conclusions of Law constituting my decision in said action:

Findings of Fact

1. During the years 1943, 1944 and 1945 the plaintiff, Norman L. Baker, was a citizen of the United States and domiciled in the State of Michigan.

2. The plaintiff did not maintain a permanent place of abode in the State of Wisconsin during any of the years 1943, 1944 and 1945.

3. The plaintiff spent in the aggregate more than 7 months of each of the years 1943, 1944 and 1945 within the State of Wisconsin.

4. The plaintiff received income from personal services and intangible personal property during each of the years 1943, 1944 and 1945.

5. The plaintiff made no income tax return or report to the State of Wisconsin, or to any official, agency or department of the State of Wisconsin, of the income received by the plaintiff during any of the years 1943, 1944 and 1945.

6. Upon due and proper notice and in accordance with the provisions of para. (a) of subsecs. (4), (6) and (7) of sec. 71.09 of the Wisconsin Statutes of 1945, the defendant, John H. Leenhouts, as Assessor of Incomes of the Wisconsin Department of Taxation for the Milwaukee District of the State of Wisconsin, made assessments against the plaintiff of income of the years 1943, 1944 and 1945 subject to taxation by the State of Wisconsin, and of Wisconsin income taxes thereon, and entered the same on the tax rolls, as follows:

Year 1943

Income Assessed	$13,000.00		
Normal Tax			
Amount of Tax	458.00		
Interest	37.33		
Tax and Interest		$495.33	
Teachers' Retirement Fund Surtax			
Amount of Tax	70.08		
Interest	5.71		
Tax and Interest		75.79	
Total Taxes and Interest			$571.12

Year 1944			
Income Assessed	$14,000.00		
Normal Tax			
Amount of Tax	528.00		
Interest	16.64		
Tax and Interest		$544.64	
Teachers' Retirement Fund Surtax			
Amount of Tax	81.75		
Interest	2.58		
Tax and Interest		84.63	
Total Taxes and Interest			$628.97
Year 1945			
Income Assessed	$13,000.00		
Normal Tax			
Amount of Tax	458.00		
Interest	None		
Tax and Interest		$458.00	
Teachers' Retirement Fund Surtax			
Amount of Tax	70.08		
Interest	None		
Tax and Interest		70.08	
Total Taxes and Interest			$528.00

7. Pursuant to the provisions of Section 71.36 of the Wisconsin Statutes of 1945, the defendant, John H. Leenhouts, as said Assessor of Incomes, caused to be issued to the defendant George M. Hanley, as sheriff of the County of Milwaukee, State of Wisconsin, warrants commanding

said defendant George M. Hanley, as such sheriff, to make collection of said income taxes so assessed against the plaintiff on income of the years 1943 and 1944, together with all penalties, interest and expenses, and to levy upon the property of the plaintiff and sell sufficient thereof to pay such taxes with the penalties, interest and costs, as provided by subsec. (1) of said Section 71.36 of the Wisconsin Statutes of 1945 which said warrants were returned wholly unsatisfied to and filed with the Clerk of the Circuit Court for Milwaukee County, State of Wisconsin as provided in Section 71.36(2) of the Wisconsin Statutes of 1945.

8. The defendant John H. Leenhouts, as said Assessor of Incomes, intended to enforce the income taxes assessed against the plaintiff as above on income of the year 1945 and collect said income taxes so assessed, with the penalties, interest and costs as provided by law, and to use any and all of the remedies provided by the Wisconsin Statutes to enforce such collection thereof.

9. The plaintiff did not in any of the pleadings or at the trial in any way challenge or contest the validity of the provisions of Section 71.01 of the Wisconsin Statutes of 1945, and particularly the provision that any natural person who spends in the aggregate more than 7 months of the income year within the State of Wisconsin shall be deemed to be residing within the State of Wisconsin for purposes of determination of liability for income taxes and surtaxes, or assert that said provision is invalid or unconstitutional.

Conclusions of Law

1. During the years 1943, 1944 and 1945 and each of said years the plaintiff was residing within the State of Wisconsin.

2. The plaintiff is subject to taxation by the State of Wisconsin upon income received by him during the years 1943, 1944 and 1945 from personal services and intangible personal property.

3. The plaintiff is subject to and liable for the Wisconsin income taxes assessed against him on income of the years 1943, 1944 and 1945 as set forth in Finding No. 6 and

is liable to the State of Wisconsin for said taxes as so assessed.

4. The plaintiff waived any right to raise any question of the constitutionality of the provisions of Section 71.01 of the Wisconsin Statutes of 1945 and particularly the provisions thereof that a natural person who spends in the aggregate more than 7 months of the income year within the State of Wisconsin shall be deemed to be residing within the State of Wisconsin for the purposes of determining liability for income taxes and surtaxes.

5. This action should be dismissed with costs and disbursements to the defendants.

Let judgment be entered dismissing this action with costs and disbursements to the defendants.

Dated this 13th day of December, 1949.
By the Court,

CHAS. L. AARONS,
Circuit Judge.

Cover.

Appellant's request and motion for additional Findings of Fact.
Order denying requested Findings.
Judgment dismissing action.

Issues

Proof of Service of Summons and Complaint.
Summons.
Original Complaint.

Complaint

As Amended to Include Assessment for 1945

[Title omitted]

The above named plaintiff by Norman J. Baker, his attorney, for complaint against the above named defendants alleges and shows to the Court:

1. That said plaintiff is and at all times hereinafter mentioned was a citizen of the United States and of the State of

Michigan, having his domicile and place of residence at the Village of Beulah in the County of Benzie in the said State of Michigan.

2. That said defendant, John H. Leenhouts, is the Assessor of Incomes in and for the City and County of Milwaukee in said State of Wisconsin, and in respect to some matters hereinafter referred to he purports to act for and in the name and as a part of said defendant, Wisconsin Department of Taxation.

3. That said defendant, George M. Hanley, is and at the times hereinafter referred to, was the Sheriff of Milwaukee County, Wisconsin.

4. That said defendant, John H. Leenhouts, as Assessor of Incomes, has no power or authority other than that specifically conferred upon him by Wisconsin Statutes; that Section 71.09, Wisconsin Statutes, relates to the duty of taxpayers to file returns and the power of the Assessor of Incomes and the Tax Commission to make assessments, and it includes subsection 6 which reads:

> "(6) In case of the failure on the part of any person to make a report of income within the time and in the manner prescribed by law, the Department of Taxation or Assessor of Incomes may enter an assessment against said person upon ten days' notice in writing in a sum of not less than $500.00. Such notice may be served by mail. After the tax on such assessment has been entered on the assessment roll, the person assessed shall be forever barred from questioning the correctness of the same in any action or proceeding."

5. That said subsection 6 of Section 71.09 is the only provision of Wisconsin Statutes conferring power upon the Assessor of Incomes to assess the income of one who refuses to make a return.

6. That said defendant, John H. Leenhouts, at all times herein referred to, had specific notice and well knew that said plaintiff, Norman L. Baker, was not a resident or taxpayer in Wisconsin in either of the years 1943 and 1944, and at all such times was and is domiciled at Beulah in the State of Michigan.

7. That on or about the 19th day of November, 1945, as plaintiff is informed and believes, the said defendant, John H. Leenhouts, pretending to act pursuant to said subsection 6 of Section 71.09, Wisconsin Statutes, maliciously, wrongfully and unlawfully made an assessment of $1,200.09 upon assumed income of said plaintiff in the years 1943 and 1944, and placed such assessment upon the assessment roll in his office and that thereafter he caused the same to be entered upon the tax roll.

8. That thereafter and on or about the 25th day of April, 1946, said John H. Leenhouts, Assessor, in the name of Wisconsin Department of Taxation, maliciously, wrongfully and unlawfully caused a so-called delinquent income tax warrant to be issued and delivered to said defendant, George M. Hanley as Sheriff of Milwaukee County, Wisconsin, purporting to command said Sheriff to make collection of said unlawful assessment with penalty, interest and expenses, and to levy upon the property of said plaintiff; and that said defendant, George M. Hanley as such Sheriff, pursuant to said warrant has demanded payment by said plaintiff, of said unlawful assessment and will, unless restrained, as plaintiff is informed and believes, levy upon the property of said plaintiff and forcibly collect said amount from the property of said plaintiff and thus cause him loss and embarrassment for which there is no adequate remedy at law.

9. That said assessment and tax is wholly void because plaintiff in said years was not a taxpayer or resident of the City or County of Milwaukee or the State of Wisconsin, but as Assessor well knew, had his domicile and permanent residence in Beulah in the County of Benzie and State of Michigan and at no time in either of said years, lived or resided in Wisconsin and had no income from any business or property in the State of Wisconsin and was not liable to income tax therein or required to make any report of income.

10. That the malicious, wrongful and unlawful determination of the Assessor that plaintiff was domiciled in the City of Milwaukee and was liable to income tax assessment, must be subject to judicial review but the Wisconsin Statutes provide no judicial review or remedy and plaintiff has no other remedy than an action in equity to avoid and enjoin the collection of said assessment.

11. That the provision of said subsection 6 reading,

"After the tax on such assessment has been entered on the assessment roll, the person assessed shall be forever barred from questioning the correctness of the same in any action or proceeding."

if applicable to the case of one who is or claims to be domiciled in another state and for that reason not a taxpayer of Wisconsin and not liable to income taxation and not required to make a report of his income to the Assessor, is unconstitutional and void for the reason that it would contravene, violate and deny the plaintiff the protection of, the following provisions of the Constitution of Wisconsin and the Constitution of the United States:

(1) Section 9, Article I, Wisconsin Constitution:

"Every person is entitled to a certain remedy in the laws for all injuries and wrongs which he may receive in his person, property of character, he ought to obtain justice freely and without being obliged to purchase it, completely and without denial, promptly and without delay, conformably to the laws."

(2) Section 1, Article IV, Wisconsin Constitution:

"The Legislative power shall be vested in a Senate and Assembly."

(3) Section 2, Article VII, Wisconsin Constitution:

"The judicial power of this state, both as to matters of law and equity, shall be vested in a supreme court, circuit courts, courts of probate, and in justices of the peace. The legislature may also vest such jurisdiction as shall be deemed necessary in municipal courts, and shall have power to establish inferior courts in the several counties, with limited civil and criminal jurisdiction. Provided, that the jurisdiction which may be vested in municipal courts shall not exceed in their respective municipalities that of circuit courts in their respective circuits as prescribed in this constitution; and that the legislature shall provide as well

for the election of judges of the municipal courts as of the judges of inferior courts, by the qualified electors of the respective jurisdictions. The term of office of the judges of the said municipal and inferior courts shall not be longer than that of the judges of the circuit courts."

(4) Section 13. Article XIV, Wisconsin Constitution:

"Such parts of the common law as are now in force in the territory of Wisconsin, not inconsistent with this constitution shall be and continue part of the law of this state until altered or suspended by the legislature."

(5) Section 1, Article XIV, Constitution of the United States:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty of property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

12. That no remedy for judicial review of or against the arbitrary, malicious, wrongful and unlawful acts of said defendants herein alleged is provided by Statute or exists under the Statutes of the State of Wisconsin and plaintiff has no adequate remedy at law and his rights can be protected and secured only in this action in equity.

And said plaintiff for a second and separate cause of action against said defendants alleges and shows to the Court as follows:

Said plaintiff by reference thereto incorporates in this statement of such second cause of action the several paragraphs marked 1, 2, 3, 4 and 5 and makes them by reference allegations of this second cause of action.

That said plaintiff further alleges that said defendant, John H. Leenhouts, at all times herein referred to had specific notice and well knew that said plaintiff, Norman L. Baker, was not a resident or taxpayer in Wisconsin at any time in the year 1945 and throughout said year was and still is domiciled at Beulah in the State of Michigan.

That on or about the 5th day of May, 1947, as plaintiff is informed and believes, the said defendant John H. Leenhouts, pretending to act pursuant to said Subsection 6 of Section 71.09, Wisconsin Statutes, maliciously, wrongfully and unlawfully made an assessment against said plaintiff upon the assumed income of said plaintiff in said year 1945, and placed such assessment upon the assessment roll in his office and threatens to cause such assessment to be entered upon the tax roll and to force payment thereof by warrant issued to said Sheriff.

And said plaintiff as further allegations in this second cause of action herein by reference restates and incorporates the allegations of said first cause of action in paragraphs numbered 8, 10, 11 and 12.

Wherefore plaintiff demands judgment forever restraining and enjoining the collection or enforcement of the income tax assessments herein above referred to or any other assessment of income received by plaintiff in the years 1943, 1944 and 1945, or in any of said years, and adjudging such assessments to be void.

NORMAN J. BAKER,
Attorney for Plaintiff

P.O. Address
324 East Wisconsin Avenue
Milwaukee 2, Wisconsin

(Verification omitted)

ANSWER TO AMENDED COMPLAINT

[Titled Omitted]

The above named defendants by their attorneys answering the amended complaint of the plaintiff in the above entitled action:

I. For answer to the first cause of action:

1. Admit that the plaintiff is, and at all of the times mentioned in the amended complaint was, a citizen of the United States.

2. Deny that the plaintiff is, and at all of the times mentioned in the complaint was, a citizen of the State of Michigan, having his domicile and place of residence at the Village of Beulah in the County of Benzie in said State of Michigan.

3. Admit that the defendant John H. Leenhouts is the Assessor of Incomes in and for the City and County of Milwaukee in the State of Wisconsin and in respect to the matters set forth in the complaint purports to and does act for and in the name of and as a part of the defendant Wisconsin Department of Taxation.

4. Allege that the defendant Wisconsin Department of Taxation is a department of the State of Wisconsin created by Wisconsin Statutes as an agency and division of the state government of the State of Wisconsin and that the defendant John H. Leenhouts as said assessor of incomes is an official or employee of the State of Wisconsin.

5. Admit that the defendant George M. Hanley is, and at the times referred to in the complaint was, the sheriff of the County of Milwaukee in the State of Wisconsin.

6. Admit that the defendant John H. Leenhouts as said Assessor of Incomes has only that power or authority specifically conferred upon an assessor of incomes by the Wisconsin Statutes or which may be delegated to or conferred upon him by the Wisconsin Department of Taxation in accordance with the provisions of the Wisconsin Statutes.

7. Admit that sec. 71.09 of the Wisconsin Statutes relates to the duty of taxpayers to file returns of income and the power of the assessor of incomes and of the Wisconsin Department of Taxation to make assessments of income taxes and includes subsec. (6) as quoted on page 2 of the complaint.

8. Deny that said subsection (6) of sec. 71.09, Wisconsin Statutes is the only provision of the Wisconsin Statutes conferring power upon or authority to an assessor of incomes to assess the income and income taxes of one who refuses to make a return or report of his income for purposes of the Wisconsin income tax laws.

9. Deny that the defendant John H. Leenhouts at all times referred to in the complaint had specific notice of or knew that said plaintiff was not a resident of the State of Wisconsin in either of the years 1943 or 1944 or had specific notice of or knew that at all of the times in either of the years 1943 and 1944 the plaintiff was or is domiciled at Beulah in the State of Michigan.

10. Admit that at all of the times mentioned in the complaint the defendant John H. Leenhouts had knowledge that the plaintiff claimed he was not a resident or taxpayer in Wisconsin at all times in the years 1943 and 1944.

11. Deny that the plaintiff was a nonresident of the State of Wisconsin during the years 1943 and 1944 or either of said years.

12. Admit that on November 19, 1945 the defendant John H. Leenhouts acting pursuant to the provisions of subsection (6) of Section 71.09 of the Wisconsin Statutes and of any other applicable provisions of the Wisconsin statutes made an assessment of Wisconsin income taxes against the plaintiff in the sum of $1,200.09 upon income of the plaintiff of the years 1943 and 1944, and further Admit that said defendant John H. Leenhouts as said Assessor of Incomes placed and entered such assessment upon the assessment roll in his office and entered the same upon the tax roll.

13. Deny that the making of said assessment of said Wisconsin income taxes against the plaintiff in respect to income for the years 1943 and 1944 was wrongful or unlawful, or malicious.

14. Deny that the placing and entering of such assessment upon the assessment roll or the entering of the same upon the tax roll was wrongful or unlawful.

15. Allege that the making of said assessment, the placing and entering the same upon the assessment roll, and the entering the same upon the tax roll were done and performed in accordance with and pursuant to the provisions of the Wisconsin Statutes.

16. Allege that on September 21, 1945 the defendants Wisconsin Department of Taxation and John H. Leenhouts, Assessor of Incomes, duly notified the plaintiff to make and file income tax reports of the income of the plaintiff of the years 1943 and 1944, which notice was given by a letter sent to said plaintiff that date by registered mail, of the following content:

(Copy of letter omitted)

17. Allege that the said plaintiff failed to comply with said notice of September 21, 1945; that he failed to make any return or report of his income to or file the same with the defendant Wisconsin Department of Taxation or the defendants John H. Leenhouts as the assessor of incomes; and that on October 29, 1945 the defendants Wisconsin Department of Taxation and John H. Leenhouts, Assessor of Incomes, duly gave to the plaintiff notice in writing by a letter sent to the plaintiff on said October 29, 1945 by registered mail, of the following content:

(Copy of letter omitted)

18. Allege that said plaintiff failed to make or file any report or return of his income for the years 1943 or 1944, or of either of them, and that on November 19, 1945 the defendants Wisconsin Department of Taxation and John H. Leenhouts, Assessor of Incomes, duly notified the plaintiff in writing that pursuant to the notice given to the plaintiff under date of October 29, 1945, as hereinbefore mentioned, assessments of income for the years 1943 and 1944 had been made against the plaintiff and that said assessments with the taxes and interest computed thereon would be entered on the January 1, 1946 tax roll, which said notice was sent

to the said defendant by registered mail in the form and content as follows:

(Copy of letter omitted)

19. Allege that the plaintiff Norman L. Baker has made no return or report of any kind or content to the defendant Wisconsin Department of Taxation, or to the defendant John H. Leenhouts, Assessor of Incomes, or to any other official of the State of Wisconsin, of the income of the plaintiff of the years 1943 and 1944, or of either of said years.

20. Allege that on the 10th day of December, 1945 the said assessment of income of the plaintiff of the years 1943 and 1944 and of the Wisconsin income taxes thereon, computed in accordance with the notice to the plaintiff given on November 19, 1945 and with the statutes of the State of Wisconsin, was placed upon the assessment roll in the office of the defendant John H. Leenhouts, Assessor of Incomes.

21. Admit that thereafter and on April 25, 1946 the defendant John H. Leenhouts, as Assessor of Incomes, caused to be issued to the sheriff of the county of Milwaukee and state of Wisconsin, by the defendant Wisconsin Department of Taxation, a warrant pursuant to the provisions of sec. 71.36 of the Wisconsin Statutes, which was delivered to the defendant George M. Hanley, as Sheriff of said county of Milwaukee, state of Wisconsin on said April 25, 1946.

22. Admit that said warrant commanded said defendant George M. Hanley as said sheriff to make collection of said income taxes so assessed together with all penalties, interest and expenses as provided by the Wisconsin statutes and to levy upon the the property of said plaintiff and sell sufficient thereof to pay such tax with the said penalties, interest and costs as provided by law.

23. Allege that on said April 26, 1946 the said defendant George M. Hanley as such sheriff served said income tax warrant upon the plaintiff by delivering to and leaving with him personally a true copy thereof.

24. Admit that the defendant George M. Hanley as such sheriff did thereupon, pursuant to said warrant, demand payment of plaintiff of the amount of said taxes with the penalties and costs provided by law.

25. Allege that the said plaintiff then and there refused to make payment of the said delinquent income taxes with the penalties, interest and costs as provided by law, and that thereafter the said defendant George M. Hanley as such sheriff did return said warrant wholly unsatisfied on April 29, 1946 filed the same with the Clerk of the Circuit Court for Milwaukee County, state of Wisconsin.

26. Admit that said defendants Wisconsin Department of Taxation and John H. Leenhouts intend to enforce the claim of the State of Wisconsin for the Wisconsin income taxes so assessed, with the penalties, interest and costs as provided by law, and to that end will, and it is their duty to, use any and all of the remedies provided by the Wisconsin statutes in respect to the same and take all lawful steps, actions or proceedings to enforce the collection thereof.

27. Deny that the enforcement of the collection of said Wisconsin income taxes so assessed, with the penalties, interest and costs as provided by law, will cause the plaintiff loss or damage and Allege that any alleged loss or injury he may deem that he suffers by reason thereof is *damnum absque injuria*.

28. Allege that under the Wisconsin statutes the plaintiff was afforded an adequate remedy to protect himself in the premises by complying with the said notifications of September 21, 1945 and October 29, 1945 by filing with the defendant Wisconsin Department of Taxation or the defendant John H. Leenhouts, Assessor of Incomes an income tax return or report showing his income of the years 1943 and 1944 or separate returns and reports of his income for each of said years, and then before any assessment of income or income taxes in respect to income of the years 1943 and 1944, or either of them, could be made against him notice in writing would be required as provided in sec. 71.12 of the Wisconsin Statutes and the plaintiff would have all of the rights and privileges for hearing upon and review of such asserted income tax liability as provided by the Wisconsin statutes; that said defendant wholly failed to make any report or income tax return to the defendant Wisconsin Department of Taxation or to the defendant John H. Leenhouts, Assessor of Incomes of the income of the plaintiff

for the years 1943 and 1944, or either of said years, in response to said notices of September 21, 1945 and October 29, 1945 and has refused and continues presently to refuse to make any such report or return to them or either of them in respect to his income of said years or either of them.

29. Deny that the said assessments and the income taxes assessed and levied against the plaintiff for the years 1943 and 1944 or any of the same are void for the reasons set forth in the complaint or for any other reason.

30. Allege that if the plaintiff now finds himself without remedy under the Wisconsin statutes to review the validity and enforceability of said assessment of income and income taxes against the plaintiff it is due solely to the failure or refusal of the plaintiff to follow, avail himself of or comply with the provisions of the Wisconsin statutes affording administrative remedies in respect thereto, and that the plaintiff is now in no position to invoke any equity jurisdiction of this court for the reason that he has failed to avail himself of or exhaust his administrative remedies as provided by the Wisconsin statutes.

31. Deny that the provisions of subsec. (6) of sec. 71.09, Wisconsin Statutes, or any of them are unconstitutional or void as violative of any of the provisions of the constitution of the state of Wisconsin or of any of the provisions of the constitution of the United States set forth in the complaint or of any other provisions of the constitution of the State of Wisconsin or of the constitution of the United States or for any other reason.

32. Deny that the acts or any of them of the defendants set forth in the amended complaint are arbitrary, or are wrongful or are unlawful, or are or were malicious, and Allege that all of said acts were done and performed pursuant to provisions of the Wisconsin Statutes.

II. For answer to the second cause of action:

(Omitted because same as above answer to first cause except it relates to assessment of 1945.

• • •

Blue Cover.

THE EVIDENCE

Stipulation for and Order Setting Bill of Exceptions.

Corrections in transcript.

Bill of Exceptions and Appearances.

Withdrawal of Defendant's Motion for Summary Judgment.

Norman L. Baker, witness on his own behalf, being first duly sworn testified as follows:

My name is Norman L. Baker. My residence and domicile is Village of Beulah, Michigan. That has been my domicile since January 1, 1941.

Prior to January 1, 1941, my selected domicile was Milwaukee, Wisconsin.

Question: How many homes did you own in 1940? Question objected to by Mr. Persons on behalf of defendant followed by discussion.

Answer is received, but not to contradict the decisions of the Supreme Court referred to in the discussion.

In 1940 and ever since 1923 or 1925, I had two homes, one a summer home at Beulah, Michigan, and other a winter home maintained at Milwaukee.

I purchased the land consisting of five acres in the Village of Beulah in 1923. In 1925 I built a home, which might be called a summer home although it was lined and heatable with a fireplace, but intended for use during the summer months and not during the winter months. In 1939 or thereabouts, I determined to change my domicile from the Milwaukee home to the Michigan home and for that very purpose constructed a new home that was usable all through the winter. It was very substantially built. It could easily be heated by electricity during cool weather with the appliances I had—with an oil burner in the winter and it was built with the announced or declared purpose of making it Mrs. Baker's and my future home, upon change of domicile when convenient.

STATE OF WISCONSIN, CIRCUIT COURT, MILWAUKEE COUNTY

(Circuit Court No. 202-577)

NORMAN L. BAKER, Plaintiff,

vs.

JOHN H. LEENHOUTS, Wisconsin Department of Taxation and GEORGE M. HANLEY, Sheriff of Milwaukee County, Defendants.

JUDGMENT—Filed December 14, 1949, Fred J. Jaeger, Clerk.

This action having been brought to trial before the court and the court having made and filed its Findings of Fact and Conclusions of Law therein and directed judgment for the defendant.

Now on motion of Thomas E. Fairchild, Attorney General of Wisconsin by Harold H. Persons, Assistant Attorney General and William J. McCauley, District Attorney, Milwaukee County, State of Wisconsin by Oliver L. O'Boyle, Corporation Counsel, attorneys for the defendants:

It is adjudged that the complaint and this action be dismissed on the merits and that the defendants have and recover of the plaintiff the sum of Fifty Dollars ($50.00) costs.

Dated this 13th day of December, 1949.

By the Court,

CHAS. L. AARONS,
Circuit Judge.

STATEMENT REQUIRED BY PARAGRAPH 2, RULE 12, OF THE RULES OF THE SUPREME COURT OF THE UNITED STATES

IN SUPREME COURT, STATE OF WISCONSIN, AUGUST TERM, 1950

No. 55

NORMAN L. BAKER, Plaintiff-Appellant,

vs.

JOHN H. LEENHOUTS, Wisconsin Department of Taxation, and GEORGE M. HANLEY, Sheriff, Defendants-Respondents.

To said Defendant-Respondents, John H. Leenhouts, Wisconsin Department of Taxation, and George M. Hanley:

Pursuant to Rule 12, Paragraph 2, Rules of the Supreme Court of the United States, you are hereby served with copies of the petition for appeal, order allowing appeal and fixing amount of the appeal bond, assignment of errors and prayer for reversal, statement as to jurisdiction and citation on appeal, in the above entitled cause.

Your attention is directed to the provisions of Rule 12, Paragraph 3, of the Rules of the Supreme Court of the United States, which reads as follows:

"Within 15 days after such service the appellee may file with the Clerk of the Court possessed of the record, and serve upon the appellant, a typewritten statement disclosing any matter or ground making against the jurisdiction of this Court asserted by the appellant. There may be included in or filed with such opposing statement a motion by appellee to dismiss or affirm. Where such a motion is made it may be opposed as provided in Rule 7, Paragraph 3."

Dated April 2nd, 1951.

LOUIS QUARLES,
NORMAN J. BAKER,
Counsel for Plaintiff-Appellant.

19

Office-Supreme Court
FILED
MAY 10 19
ELMORE C

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 734

NORMAN L. BAKER,

Appellant,

vs.

JOHN H. LEENHOUTS, WISCONSIN DEPARTMENT OF TAXATION, AND GEORGE M. HANLEY, SHERIFF

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

STATEMENT OPPOSING JURISDICTION

VERNON W. THOMSON,
Attorney General of Wisconsin,
HAROLD H. PERSONS,
Assistant Attorney General of Wisconsin,
Counsel for Appellees.

INDEX

Subject Index

	Page
Statement opposing jurisdiction	1
Nature of the case	1
Statutes involved	6
Statement of facts	7
No substantial federal question is presented	16
The case is moot	17
Appellant waived any challenge of validity of Sec. 71.01 Wisconsin Statutes	20
No invalidity of Sec. 71.01 Wisconsin Statutes was involved in the trial of this case	22

Table of Cases Cited

Baker v. *Department of Taxation*, 250 Wis. 439, 27 N. W. (2d) 467	11, 24, 33
Baker v. *Leenhouts*, 257 Wis. 584, 44 N. W. (2d) 544	1
Baker v. *Wisconsin Department of Taxation*, 246 Wis. 611, 18 N. W. 331	7
Wendlandt v. *Industrial Comm.*, 256 Wis. 62, 39 N. W. (2d) 854	21

Statutes Cited

Constitution of Wisconsin, Article IV, Section 27	18
Wisconsin Statutes of 1945:	
Section 71.01	5, 16, 21
Section 71.09(1)	6
Section 71.09(4) (a)	23
Section 71.09(6)	3, 4, 5, 12, 22
Section 71.12	
Section 73.02	18
Section 73.03	18
Wisconsin Statutes 1949:	
Chapter 227	18, 19, 24
Chapter 227.16(1)	19

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 734

NORMAN L. BAKER,

Appellant,

vs.

JOHN H. LEENHOUTS, WISCONSIN DEPARTMENT OF TAXATION, AND GEORGE M. HANLEY, SHERIFF

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

STATEMENT OPPOSING JURISDICTION

Pursuant to Paragraph 3 of Rule 12 of the Rules of the Supreme Court of the United States, the Attorney General of the State of Wisconsin files this statement opposing jurisdiction.

Nature of the Case

This is an appeal by Norman L. Baker from a judgment of the Supreme Court of the State of Wisconsin entered on November 8, 1950 and reported *Baker* v. *Leenhouts*, 257 Wis. 584 (Adv. Sh.) 44 N.W. 2d 544, in respect to which a rehearing was denied January 9, 1951. This judgment

of the Supreme Court of the State of Wisconsin affirmed a judgment of the Circuit Court for Milwaukee County, State of Wisconsin, dismissing an action brought by the Appellant Norman L. Baker against John M. Leenhouts, who was then the assessor of incomes of the State of Wisconsin for the district which included the city of Milwaukee; Wisconsin Department of Taxation; and George M. Hanley, who was at the time of the commencement of the action the sheriff of Milwaukee County, State of Wisconsin, as defendants. The action so dismissed was to enjoin the defendants from collecting income tax assessments made against said Norman L. Baker upon his assumed income for the years 1943, 1944 and 1945 which had been made against him as "doomage" assessments because and by virtue of his failure and refusal to file an income tax return as requested and demanded by the taxing officials of the state of Wisconsin. At the time of the demands upon the Appellant Norman L. Baker to make and file Wisconsin income tax returns and at the time of the making of the doomage assessments against him he was physically present in the state of Wisconsin, he was engaged in employment as an attorney in the state of Wisconsin, he resided in the state of Wisconsin but claimed a technical domicile at Beulah, in the state of Michigan. The notices of demand to file income tax returns were served upon and received by him in the state of Wisconsin. The notices of doomage assessments were delivered to and received by him in the state of Wisconsin.

The injunction proceedings in the Circuit Court for Milwaukee County were commenced in October 1947. The only challenge of any invalidity or unconstitutionality of any statute of the state of Wisconsin is that set forth in Paragraph 11 of the Amended Complaint in that action. Paragraph 11 of the Amended Complaint is directed towards and attacks only the applicability and validity of subsec.

(6) of sec. 71.09 of the Wisconsin Statutes, which is the statute commonly known as the "doomage" assessment provision. Said Paragraph 11 of the Amended Complaint contains 5 subparagraphs reciting constitutional provisions upon which the Appellant based his claim and assertion in that action that the so-called "doomage" assessment provisions in subsec. (6) of sec. 71.09 of the Wisconsin Statutes were challenged. A search through the Amended Complaint will reveal that there is not another word in the whole Amended Complaint that asserts unconstitutionality of any provision of the Wisconsin Income Tax Law.

The entire tenor of the remainder of the complaint is that the Appellant Norman L. Baker was domiciled at the Village of Beulah, County of Benzie, State of Michigan and that therefore any assessment made under sec. 71.09 was without validity because that statute was invalid and did not confer any power upon the assessor of incomes to make an assessment against the Appellant.

The answer to the Amended Complaint denied the allegation that the Appellant during the times involved had his domicile in and was a resident of the state of Michigan. Thus the matter of residence and domicile of the Appellant was put directly in issue. Obviously as the only allegation or challenge of unconstitutionality of any statute was that contained in Paragraph 11 of the Amended Complaint, the only part of the answer to the Amended Complaint that treats of or makes any allegation respecting constitutionality or validity of any provision of the Wisconsin statutes is that contained in the responsive denial of the unconstitutionality of the provisions of subsec. (6) of sec. 71.09 of the Wisconsin statutes.

The critical part of the provisions of said sec. 71.09 (6) Wisconsin Statutes, which was of concern to the Appellant in that case and gave rise to his challenge of the constitu-

tionality of the provisions of that subsection, is the language in the last sentence which says that after such a doomage assessment has been entered on the assessment roll the taxpayer shall be forever barred from questioning the correctness of the same in any action or proceeding.

The provisions of sec. 71.09 (6) (1945 Wisconsin Statutes) (now section 71.11 (5) Wisconsin Statutes 1949) are as follows:

> "(6) DEFAULT ASSESSMENT. In case of the failure on the part of any person to make a report of income within the time and in the manner prescribed by law, the department of taxation or assessor of incomes may enter an assessment against said person upon 10 days' notice in writing in a sum of not less than $500. Such notice may be served by mail. After the tax on such assessment has been entered on the assessment roll the person assessed shall be forever barred from questioning the correctness of the same in any action or proceeding."

Nevertheless the Circuit Court permitted the Appellant to challenge the assessment by showing factually that he was not within the provisions of the Wisconsin statutes relating to liability for income taxation. The case was tried upon the pleadings as set forth in the Amended Complaint and the answer to the Amended Complaint previously mentioned. The Appellant's entire position at the trial and his sole attack upon the assessment was that factually he was domiciled in the state of Michigan and therefore he was not within the provisions of the Wisconsin Statute imposing income tax liability. In other words, his theory of the case and conduct of the trial was pointed solely towards showing the facts and that they demonstrated that he was domiciled in Michigan. He took the provisions of the Wisconsin income tax law imposing liability for taxes, sec. 71.01, and endeavored to show factually that he did not come within the provisions thereof.

The trial court found that the facts showed he was technically domiciled in the state of Michigan during the years 1943, 1944 and 1945, but the court also found that he spent more than 7 months in the aggregate in each of those years in the state of Wisconsin and therefore he was residing within the state of Wisconsin for the purposes of that statute and came within the provisions of that statute imposing liability for income taxes in such instances. Not until after the court's decision had been rendered and the case fully completed and tried did the Appellant then attempt to make some challenge of the validity of the provisions of sec. 71.01, Wisconsin Statutes. The trial court correctly held that at no time in the proceeding had he ever asserted any invalidity as respects any Wisconsin statutes except the provision in sec. 71.09 (6), previously mentioned. Accordingly the court held that he had not challenged the constitutionality and that he had waived any such challenge and dismissed the action. The Supreme Court of the State of Wisconsin on appeal from the judgment so dismissing the action likewise held that the Appellant had not asserted any challenge of unconstitutionality of any provisions of the Wisconsin statutes other than sec. 71.09 (6) and that the finding of the trial court that the Appellant spent in the aggregate more than 7 months of each of the years in question in Wisconsin was amply supported by the evidence in the record. The Supreme Court of Wisconsin therefore affirmed the dismissal of the action.

The Supreme Court of Wisconsin in its decision did not pass upon or consider the constitutionality of the 7 months' provision in sec. 71.01. By motion for rehearing the Appellant endeavored to have the Supreme Court of Wisconsin so consider said provision but it adhered to its previous decision that the Appellant had waived his right to challenge it because he had not asserted it at the trial of the case and denied the motion for rehearing.

Statutes Involved

The provisions of the Wisconsin statutes imposing income taxes that might be material upon consideration of this appeal are as follows: (All references unless otherwise designated are to the provisions of the 1945 Wisconsin statutes.) (The provisions of the 1945 statutes remained unchanged and were the same all during the years involved. However, since that date there has been a rearrangement of the section numbering and the sections in the present 1949 statutes are in some instances different).

"71.01 Persons and subjects taxable. There shall be assessed, levied, collected and paid a tax on all net incomes as hereinafter provided, by every person residing within the state or by his personal representative in case of death; and by every nonresident of the state, upon such income as is derived from property located or business transacted within the state, except as hereinafter exempted. Every natural person domiciled in the state of Wisconsin, and every other natural person who maintains a permanent place of abode within the state or spends in the aggregate more than seven months of the income year within the state shall be deemed to be residing within the state for the purposes of determining liability for income taxes and surtaxes. * * *"

"71.09 Power of assessment; filing returns; penalties. (1) * * *

"(2) * * *

"(3) * * *

"(4) * * *

"(5) * * *

"(6) In case of the failure on the part of any person to make a report of income within the time and in the manner prescribed by law, the department of taxation or assessor of incomes may enter an assessment against said person upon 10 days' notice in writing in a sum of not less than $500. Such notice may be served by mail. After the tax on such assessment has been

entered on the assessment roll the person assessed shall be forever barred from questioning the correctness of the same in any action or proceeding.

"(7) * * *

"* * *."

Statement of Facts

This case in the Circuit Court for Milwaukee County was the third of three cases in which the Appellant Norman L. Baker endeavored to establish that he was domiciled in the state of Michigan. The first case reached the Supreme Court of the State of Wisconsin and its decision therein was rendered on May 1, 1945 in *Baker* v. *Wisconsin Department of Taxation*, 246 Wis. 611, 18 N.W. 331. It involved the year 1941. The facts in respect to that year, which is a backdrop against which the instant case is to be considered, are stated by the Supreme Court of the State of Wisconsin in its decision in that case at pages 613 to 616 as follows:

"* * * Briefly stated, Baker's contentions are that beginning January 1, 1941, he decided that a house on land which he owned in Beulah, Michigan, should be and was selected by him in good faith as his permanent home and domicile, without any intention of his having a home or domicile elsewhere or of ever returning to Wisconsin; that he then abandoned all evidence of residence and had no permanent place of abode in Wisconsin, and did not there spend in the aggregate more than seven months in a year; that all his declarations, acts, and conduct are consistent with and prove his *bona fide* change of domicile to the new domicile established by him in Michigan; and that the only question involved is whether appellant in good faith intended to change his domicile.

"Due consideration of all matters in the record, including Baker's testimony at the hearing on May 5, 1943, upon which the board's decision and order were based, discloses that the record well warranted the

board finding the following facts stated in its decision. From 1907 to July, 1941, Baker owned and occupied a family dwelling house on Summit avenue in Milwaukee, which he conveyed to his wife in 1941. On his income prior to and including the year 1940 he paid, as a resident of Wisconsin, the income tax assessed thereon. In his income tax return filed in March, 1941, for his 1940 income, he made a declaration to the effect that he had changed his residence from Milwaukee, Wisconsin, to Beulah, Michigan. Upon his failure in 1942 to file a return for his 1941 income, the assessor on July 8, 1942, requested him to make such a return. On August 1, 1942, he stated in a return that Beulah, Michigan, was his legal residence and that in his view he was not subject to the income tax laws of Wisconsin. He omitted to state his gross income for 1941 or any statutory deductions. Thereupon, the assessor determined that he considered Baker domiciled in Wisconsin for 1941 and subject to its income tax laws, and that his gross income for 1941 was $13,166; and upon this he levied the assessment which is in question herein. No deduction for personal exemptions was allowed to Baker, but in the income tax return filed for 1941 by his wife, who resided in the Summit avenue family dwelling place in Milwaukee, she claimed the full personal exemption of $17.50 allowable to husband and wife under sec. 71.05 (2) (b), Stats.

"Ever since 1925, Baker has been continuously employed as an associate general counsel by the Northwestern Mutual Life Insurance Company (hereinafter called 'Northwestern') at its general offices in Milwaukee, and his work was such that he had to travel frequently out of Wisconsin to attend to Northwestern's litigation or other essential duties incidental to his employment. In 1925 Baker constructed a summer residence on his land at Beulah, and there he and his family resorted, and he spent his three-week vacation and many week ends and holidays during the summer months, and frequently also during the early spring and late fall. He usually traveled there by car ferry

between Milwaukee and Ludington, Michigan, and then to Beulah by automobile; and returned to Milwaukee each Monday morning by the same travel accommodations. He planned on retiring from his employment upon becoming eligible to pension in October, 1941; and resolved that he would change his legal domicile from Wisconsin to Michigan. In this he was prompted somewhat by his impression that he was being treated unfairly by an official charged with the statutory responsibility of assessing and enforcing the collection of income taxes in Milwaukee county. But early in 1941 Baker decided it would be inadvisable for him to resign his position with Northwestern because financial reasons then existing and the imminence of war made him hesitant to give up his well-paid employment; and, because, in view of his heavy sense of responsibility to Northwestern as the result of his long years of highly useful service and association, he concluded it was his duty to see to a successful termination important litigation entrusted to his care, which was pending throughout the country and would not be disposed of by the time of his anticipated retirement. In consequence of these circumstances he found it impossible to carry out his contemplated plan of living at Beulah during the entire year; but arranged to spend many week ends there, leaving Milwaukee by car ferry Friday night and returning to Milkaukee early Monday morning.

"In attempting to support his claim that he was not in Wisconsin in the aggregate of more than seven months in the year, and as he found that because of existing restrictions on transportation he could not conveniently continue making week-end trips to Beulah, he often also traveled and spent week ends in Chicago, and returned to Milwaukee ordinarily on Monday morning in time to there perform the duties of his employment. Prior and up to 1941 Baker and his wife and others of his family made their home in their dwelling on Summit avenue, and there kept their household furniture, personal effects and belongings; but he claims that subsequently he arranged to put into opera-

tion his intention of abandoning Wisconsin as his domicile and establishing his new domicile at Beulah, Michigan, by he and his wife turning over active management of that home to their daughters-in-law, who came to live with them there at times shortly after their husbands (petitioner's sons) entered the armed services; but who at times went to live with their husbands. However, Baker and his wife were on friendly terms and continued to occupy a bedroom in that home, and he contributed to the cost of operating it, partly by turning over to his wife $100 per month for necessary expenses, and she rented it to the daughters-in-law, with the reservation that she and her husband be allowed to retain a 'couple of rooms' in the attic. They gave up the occupancy of a sleeping room, which they had occupied on the second floor, and slept in an attic room, but continued to use the second-floor bathroom. During the period in which Baker claims to have abandoned his abode and domicile in Wisconsin he frequently occupied that attic bedroom, and occasionally he slept in the second-floor bedroom or in a room he was using as his private office in a downtown Milwaukee building, which he managed and in which he had some financial interest. He spent but little time, if any, in Beulah in the winter months; and when for the greater part of the year 1941 his employment at Northwestern in Milwaukee required him to be there from Monday to Friday, inclusive, he slept at night as stated, either in the Summit avenue dwelling, or occasionally in the downtown building. His wife did not change her domicile but continued to live and reside during 1941, as she had in the past, in their Summit avenue dwelling, excepting that on occasions she visited Beulah with Baker, especially during his three-week vacation and the week ends of the summer months; and also accompanied him to Chicago on some of his week-end trips. He did not vote in Wisconsin after the fall election of 1940, and has not voted in Michigan."

Both the Circuit Court of Milwaukee County and the Supreme Court of Wisconsin in that case held that upon the basis of those facts the Appellant was domiciled in the state of Wisconsin during the year 1941 and affirmed an assessment of income taxes against him for that year.

In the second case there was involved the Appellant's income tax of the state of Wisconsin for the year 1942. That case was decided by the Supreme Court of Wisconsin on May 13, 1947 in *Baker* v. *Department of Taxation*, 250 Wis. 439, 27 N.W. 2d 467. As respects the facts in that case the Supreme Court of Wisconsin said at page 440 of the opinion as follows:

> "An appeal with respect to an assessment on appellant's 1941 income was before us in *Baker* v. *Department of Taxation* (1945), 246 Wis. 611, 18 N.W. (2d) 331. The facts were carefully reviewed in the opinion filed and it was held that the board of tax appeals was justified in finding that Mr. Baker was domiciled in Wisconsin during that year. He contended that he had abandoned his domicile in Milwaukee and had established one in Beulah, Michigan. In 1942 ration books for himself and his wife were obtained in Beulah instead of in Milwaukee and an automobile which had been registered in Wisconsin the preceding year was registered in Michigan. Other than these facts and the additional fact that Mr. Baker registered as a voter in Michigan in 1943, the facts bearing on this appeal are substantially the same as they were on the prior one. It would serve no useful purpose to restate here what was said there. The additional facts are not of sufficient consequence to overcome the board's finding upon the other evidence."

Here again the endeavor of the Appellant was to show factually that he was domiciled in Michigan. The Supreme Court of Wisconsin held that he was not domiciled in Michigan in the year 1942 on the basis of the facts as stated.

It is of note that in that case the Appellant, Norman L. Baker, challenged the proceedings that were used in making the assessment there and asserted that the assessment should have been made under sec. 71.09 (6), the "doomage" assessment provision which is the provision that was used and invoked in the instant case. The Supreme Court of Wisconsin held that as the proceedings were there conducted they were authorized and valid under other provisions of the Wisconsin statutes. Now when a doomage assessment has been made under sec. 71.09 (6) in the instant case the Appellant challenged the constitutionality of that provision and did not in any way challenge during the trial the validity of any other provision.

The trial court after hearing all of the evidence stated that the facts were essentially the same as in the previous cases with the exception that in August 1942 Appellant submitted to the Wisconsin Department of Taxation a written declaration of residence and domicile in the state of Michigan which he followed up by registration as a voter in Michigan in June or July of 1943 and by actual voting at elections for state and county officers in Michigan not later than 1944. The court found that notwithstanding the facts pertaining to the Appellant's occupations, activities, business and physical presence in the city of Milwaukee were the same as previously stated in the prior years so as to make the question of domicile a close one he was of the opinion that this declaration of intention to make his domicile in Michigan followed up by registration as a voter and actual exercise of the voting privilege in the state of Michigan was of controlling character and weighed the balance in favor of a finding of domicile in the state of Michigan during the years 1943, 1944 and 1945.

But, the trial court then went on to recite the following evidence as shown by the record:

"There is considerable evidence respecting the number of days—and even fractions of days—during which the plaintiff was physically absent from the State of Wisconsin. These absences, excepting certain periods in the summer months which were spent in Beulah, Michigan, were of two kinds: At week ends, that is from sometime during Friday until the following Monday morning, the plaintiff and his wife frequently went to Chicago on a pleasure excursion. At other times the plaintiff and his wife would take a week end trip to Beulah, Michigan. At various times the plaintiff took business trips out of the state on behalf of his employer, the Northwestern Mutual Life Insurance Company. For a time the plaintiff kept entries in the form of a diary respecting the various trips taken by him outside of the state. Later, and after the decision in one of the previous cases, he discontinued that practice.

"On direct examination he testified as his conclusion that during the three years involved he spent 'much less than the seven months here and spent more in days outside of the State—much more than the five months out of Wisconsin.' He gave many details on cross examination. In his testimony he estimates that a correct average of the number of nights that he slept at the Summit Avenue residence in Milwaukee was not more than three and half a week. There were, however, other nights when he slept at his Second Street building office.

"It appears that usually during the three years involved the plaintiff was in Milwaukee from Monday morning until late Friday afternoon, although there were times when he took the noon boat on Friday to go to Beulah, Michigan. His main occupation was that of an assistant general counsel for the Northwestern Mutual Life Insurance Company. For that purpose he had an office in the building of that life insurance company in Milwaukee. His other activities of a business nature involved his work as a trustee of a building known as the Madison Building, otherwise known as

the Second Street Building. He had an office in that building in the city of Milwaukee for the purpose of transacting his office business as such trustee. There, he testified, he wrote 'hundreds of letters.' He also had other business activities in this state in connection with the handling of a family trust in which he and his wife were trustees. This trust handled a variety of securities, including real estate bonds. He also received compensation of $1,500 a year from the Downing Box Company of Milwaukee (whose attorney he had formerly been) but without performing any active services during the years here involved except that he was a director of the company.

"The plaintiff's wife filed her income tax returns during the years in question with the Assessor of Incomes at Milwaukee. The plaintiff had nothing to do with the making of her returns, but he stated that he had seen returns of Mrs. Baker in which she gave her address as Summit Avenue, Milwaukee, stating at the same time that her husband, the plaintiff, was a nonresident. Mrs. Baker usually took the pleasure trips with her husband to Chicago at week ends, and also made the trips with her husband when he went to Beulah, Michigan.

"The plaintiff stated that he made no claim that he and Mrs. Baker had separate residences or domiciles. He added: 'The fact is that she submitted her return here because she didn't want to be obliged—as I thought the law was—to be in Wisconsin five months of the—or to be out of Wisconsin five months of the year.'

"It is quite apparent from the entire testimony of plaintiff that he so construed the seven months' provision of section 71.01 as to make necessary or appropriate a mathematical computation of the exact number of days during which he was physically absent from the State of Wisconsin in order to determine the fact as to whether he 'spends in the aggregate more than seven months of the income year within the state.'" [pp. 18-20 Ap. A. to Appellant's Jurisdictional Statement.]

After reviewing this evidence the trial court said:

"I am of the opinion that such method of computation is not contemplated by the statute in question. Pleasure trips with his wife at week ends and business trips by the plaintiff on behalf of his employer should not be excluded from the time 'spent' in the State of Wisconsin. In making such trips the plaintiff always intended, after attaining the objective of the trip, to return to his headquarters which were unquestionably in Milwaukee. I am of the opinion that where one spends most of the 'weekdays,' that is, from Monday to Friday (except his vacation periods), in a place where he has all of his business activities that he thereby 'spends' in the aggregate more than seven months of the income year within the state.

"* * *

"It must be found that the plaintiff did, within the meaning of sec. 71.01, Wis. Stats., spend in the aggregate more than seven months of each of the income years here involved in the State of Wisconsin; and that he must therefore be deemed to be residing within the State of Wisconsin during such period, notwithstanding the fact that his legal domicile was in Michigan during such period.* * *" [pp. 20-22 Ap. A. to Appellant's Jurisdictional Statement.]

The trial court thereupon made a determination and found that the facts brought the Appellant within the language of sec. 71.01 Wis. Stats., that he had not shown factually that he was outside the language of such provision, and that therefore such assessment was within the language thereof. As he had not carried and discharged the burden of proof of showing his assertion of no authority in the provisions of the Wisconsin Statutes for the making of the assessment and that it was unauthorized by the statutes, the trial court dismissed the case.

The decision of the trial court to this effect was on October 25, 1948. Thereafter on November 8, 1948 the Appellant,

Norman L. Baker, presented to the trial court a brief asking for reconsideration of the case and making an argument as to the constitutionality of sec. 71.01, Wis Stats. Copy of the brief was sent to opposing counsel but there was no motion or notice of motion which is in accordance with the procedure where a motion is involved. This was an irregular and unorthodox procedure. Ultimately the trial court thought that it should be disposed of and directed counsel for the defendants in that case to respond by way of briefs the same as though it were a motion for rehearing. Thereafter the trial court considered the matter and rendered its decision on rehearing in which it was pointed out with definiteness that at no time prior to the filing of this brief for reconsideration had the Appellant ever made any challenge or suggestion of challenge of the constitutionality of sec. 71.01. The court concluded that the Appellant was tardy in raising the question and that after the trial was all over and the court had decided the case upon the basis of the facts brought in at the trial the Appellant was too late to raise that question. The trial court then entered the judgment dismissing the case.

From this judgment appeal was taken to the Supreme Court of Wisconsin which rendered its decision on November 8, 1950 affirming the trial court's disposition of the case expressly holding that under the factual situation in the case the Appellant had not made a timely challenge of the constitutionality of the statute.

It is from this judgment of the Supreme Court of Wisconsin that the Appellant appeals to this court.

No Substantial Federal Question Is Presented

The filing of this statement objecting to jurisdiction by the Attorney General of the State of Wisconsin is occasioned by the fact that the state of Wisconsin is interested in this ap-

peal for the reason that it is an endeavor to enjoin the enforcement of an income tax assessment made by the authorities of the state of Wisconsin.

I. *The Case is Moot.*

At the time of the making of the "doomage" assessments involved herein John H. Leenhouts was the assessor of incomes of the Wisconsin Department of Taxation for the district which included the city of Milwaukee. At the time of the commencement of this injunctional proceeding in October, 1947 and all during the time of the trial and up to the final disposition of the case by the trial court, said John H. Leenhouts was the assessor of incomes for said district. However, subsequently thereto Mr. Leenhouts retired and he has not been for some time, and is not now, the assessor of incomes for that district. His successor is not a party to this action. Mr. Leenhouts as an individual person has no interest in the proceedings. He no longer has any official capacity which would give him any interest in the proceeding. Were an injunction to issue against him today it would be wholly ineffective, for he has no duties or powers to perform or exercise in respect to the assessments involved. Consequently as to Mr. Leenhouts, the case is entirely moot.

Similarly at the time of the commencement of these proceedings in the Circuit Court for Milwaukee County in October, 1947 George M. Hanley was then the duly elected, qualified and acting sheriff of Milwaukee County, State of Wisconsin, to whom an execution or other legal process would be issued to effect a collection of the doomage assessments involved. Mr. Hanley for some time has not been and is not now the sheriff of Milwaukee county. As an individual he has no interest in the proceeding. Were an injunction to issue against him at this time it would be wholly

ineffective. He has no official duties or powers in respect to the assessment involved. His successor in office has not been and is not a party to these proceedings. Therefore, as to Mr. Hanley the case is entirely moot.

The only other named defendant in the proceedings below is the Wisconsin Department of Taxation. It is nothing more than a division of the state government of Wisconsin. It is a department of the state government. It is not a body corporate or a legal entity. The provisions of sec. 73.02 and 73.03 creating the Wisconsin Department of Taxation and defining its powers and duties do not make it a legal entity or give it the right to sue or be sued. It is no more a legal entity that is capable of being made a party to a proceeding than is the laundry division of the State Penitentiary at Waupun, Wisconsin. It is given the power and duty to direct proceedings, actions and prosecutions relating to the income tax laws but it is not constituted a separate legal entity apart from the state of Wisconsin. It is no more a separate legal entity than are the many other departments, boards, commissions and bureaus of the state government of the state of Wisconsin.

Art. IV, sec. 27 of the Constitution of the state of Wisconsin provides as follows:

> "Section 27. The legislature shall direct by law in what manner and in what court suit may be brought against the state."

There are no provisions in the Wisconsin statutes authorizing suits against the state by naming the Wisconsin Department of Taxation as a defendant except a provision in Ch. 227, Wisconsin Statutes, 1949, known as the Administrative Procedure Review Act. That chapter provides a special proceeding for review of decision and orders of administrative agencies of the state of Wisconsin. It provides for review in the circuit court and sets out the pro-

cedure in detail. Sec. 227.16 (1) in specifying how the proceedings for such review shall be instituted prescribes that it is by a petition to the court for such review. It is specifically provided that the petition shall be entitled in the name of the person seeking the review as petitioner and the name of the agency whose decision is sought to be reviewed as respondent, except that where it is a review of the Wisconsin Board of Tax Appeal's decisions then the Department of Taxation shall be the named respondent. This is a special proceeding specifically limited to and directed towards court review of administrative orders and decisions. The purpose in specifying who the respondents named shall be is solely for simplification of the case and in any event is limited solely to a review proceeding under those provisions. The instant case is not a proceeding under said Ch. 227 of the Wisconsin Statutes. It is a straight ordinary injunction action in the Circuit Court for Milwaukee County. It seeks to restrain the enforcement of a state income tax assessment. The exerted force of such an injunction is against the individuals who would be exercising their functions as state officials and must be against someone who has the standing of a legal entity. The case thus is entirely one that is moot for were it to be sent back to the circuit court for entry of an injunction the injunction so entered would be entirely unenforceable for the reason that the present officials who would be charged with and have the power to enforce the assessment are not Mr. Leenhouts or Mr. Hanley or the Wisconsin Department of Taxation. Injunction could issue against Mr. Leenhouts and Mr. Hanley and be fully effective as against them as individuals but would be entirely fruitless. As an injunction against the Wisconsin Department of Taxation it will be unenforceable for there are over 400 employees of that department. It would have to operate against all of such employees.

But the state of Wisconsin obviously is interested in the impact of the instant appeal because of the fact that the subject matter is the assessment of Wisconsin income taxes. However, the state of Wisconsin as such is not made a party to the proceeding. It could not have been a named party defendant in the circuit court injunction proceedings because there is no statutory authority for suing the state in such an action. The state of Wisconsin has not consented to be sued in this type of proceeding and the Attorney General of the state of Wisconsin has no authority or power to waive the immunity of the state from such suit.

It is therefore submitted that this case is at this stage purely moot and for that reason the court should not assume jurisdiction in the case.

II. *Appellant Waived any Challenge of Validity of Sec. 71.01 Wisconsin Statutes*

The trial court in its Finding of Fact No. 9 specifically found as follows:

> "9. The plaintiff did not in any of the pleadings or at the trial in any way challenge or contest the validity of the provisions of Section 71.01 of the Wisconsin Statutes of 1945, and particularly the provision that any natural person who spends in the aggregate more than 7 months of the income year within the State of Wisconsin shall be deemed to be residing within the State of Wisconsin for purposes of determination of liability for income taxes and surtaxes, or assert that said provision is invalid or unconstitutional." [p. 47 of Appellant's Jurisdictional Statement.]

The trial court in its conclusions of law stated as follows:

> "4. The plaintiff waived any right to raise any question of the constitutionality of the provisions of Section 71.01 of the Wisconsin Statutes of 1945 and particularly the provisions thereof that a natural person who spends

in the aggregate more than 7 months of the income year within the State of Wisconsin shall be deemed to be residing within the State of Wisconsin for the purposes of determining liability for income taxes and surtaxes." [p. 49 of Appellant's Jurisdictional Statement.]

The Supreme Court of Wisconsin in its decision in this case reviewed this quoted finding and this quoted conclusion of law and specifically affirmed the same. Appellant here now asserts that the decision of the Supreme Court is not supported by authority and is inconsistent with the settled law of the state. This is erroneous and the Supreme Court in its decision specifically considered the case of *Wendlandt v. Industrial Comm.*, 256 Wis. 62, 39 N.W. 2d 854, which the Appellant there and here now relies upon. The court says specifically that that case is not the case here and held that the Appellant here did not assert any invalidity of the provisions of sec. 71.01 until after all of the issues in the case had been tried and determined by the trial court. It is fundamental that any such issues of constitutionality cannot be raised after the case is all over.

Furthermore the trial court in its opinion on the reconsideration brief of Appellant noted that not only did the Appellant raise no question as to the validity of the seven months' provision in sec. 71.01 but "industriously" tried to place himself beyond the scope thereof by giving detailed testimony and computations of time he actually was physically without the borders of the state, so as to show that he did not spend seven months in each of the years in the state.

The determination of the Supreme Court of Wisconsin upon this issue and the decision of the trial court thereon are adequately supported by the citations in the decision of the Circuit Judge.

III. *No Invalidity of Sec. 71.01 Wisconsin Statutes was Involved in the Trial of This Case*

As previously noted the only assertion in the amended complaint of the Appellant of any charge of unconstitutionality or invalidity of any statute of the state of Wisconsin was the provision in Paragraph 11 of the Amended Complaint. This Paragraph 11 is set forth at pages 51-52 of the Appendix of Appellant's Jurisdictional Statement. It contains the opening language and then has five subdivisions which set out the various constitutional provisions which the Appellant there asserted were the basis for his claim of invalidity of sec. 71.09 (6), the doomage assessment provision. As before noted the reason why the Appellant challenged the constitutionality and validity of the provisions in sec. 71.09 (6) was because of the last sentence which states specifically that after a doomage assessment has been put on the assessment roll it may not be challenged by the taxpayer in any action or proceeding. The trial court did, however, allow him to challenge the validity of the assessment as respects whether or not it was authorized by any provision of the Wisconsin statutes. His only charge or assertion of invalidity of the "doomage" assessments involved in the complaint, and at the trial, was that the factual situation did not come within the language of any of the provisions of the Wisconsin statutes. Specifically his assertion was that the facts as they existed during 1943, 1944 and 1945 were such that he did not come within any of the provisions of sec. 71.01, Wisconsin statutes.

However, at page 7 of Appellant's Jurisdictional Statement the quotation from the opening language of Paragraph 11 of the Amended Complaint would make it appear as though the Appellant was there challenging the constitutionality of other provisions than those set forth in sec. 71.09 (6). A readjng of this paragraph makes it abundantly clear

that what is there stated is a charge that the provisions of subsec. (6) of sec. 71.09 are all that is there attacked.

Under the Wisconsin income tax law every person who receives a net income of $800 or more if single or $1600 or more if married, must make a report to the Department of Taxation in the form prescribed for an income tax return on or before March 15th of each year. In addition there is a provision that whenever in the judgment of the assessment of incomes any person shall be subject to income tax in his district under the provisions of the income tax law he shall notify such person to make a report to him on or before March 15th of each year in such manner and form as is prescribed. Sec. 71.09 (4) (a), Wis. Stats. 1945. On the basis of the return so filed the taxpayer pays the taxes that he computes on the income which he therein discloses as being subject to Wisconsin income taxation. If any income or the whole income disclosed therein is claimed not to be subject to taxation then he so asserts and pays only the tax upon the income which he admits is liable to taxation. Upon the return so filed the Department of Taxation may make an assessment of additional taxes by giving to the taxpayer a notice in writing of such additional assessment. In addition the Wisconsin tax officials are given the power to make field investigations of a taxpayer's assessment as disclosed in his return. An additional assessment whether founded upon an examination of the return or upon a field investigation of the income included in the return cannot be made without giving the taxpayer a written notice of the additional assessment. The taxpayer then is accorded by the statutes a right to have a hearing in respect to the same. He may apply to the department within 30 days thereafter for an abatement of the tax. Sec. 71.12, Wis. Stats. 1945. If the abatement is denied he may then apply to the Wisconsin Board of Tax Appeals for a hearing

upon the matter and there a record is made and the Board of Tax Appeals renders its decision and order respecting the same. Such decisions and orders of the Wisconsin Board of Tax Appeals are subject to review by the circuit court of the county of residence of the taxpayer under the provisions of Ch. 227 of the Wisconsin Statutes, 1945 known as the Administrative Procedure and Review Act. The review proceedings in the circuit court are subject to appeal and review by the Supreme Court of Wisconsin.

However, if a taxpayer is notified by the assessor to make a return and he fails to do so the assessor has nothing upon which to pass or to review. Accordingly sec. 71.09 (6) covers this situation and provides that in case of failure on the part of any person to make a report then the Department of Taxation or the assessor of incomes may enter a doomage assessment against him of not less than $500 upon 10 days' notice in writing. This is the force of sec. 71.09 (6). The doomage assessment cannot be entered until the expiration of the 10 days' notice given to the taxpayer. If the taxpayer comes in during that period and makes a return or a disclosure in respect to the facts relating to his income then the doomage assessment cannot be made and is not made. But, this provision in sec. 71.09 (6) for doomage assessments provides that if the taxpayer does not do so and the doomage assessment is put on the tax roll he is thereafter precluded from challenging the validity of the assessment.

The Appellant here, Norman L. Baker, in respect to the years 1941 and 1942, which were involved in the two previous cases mentioned, *Baker* v. *Department of Taxation*, (1945) 246 Wis. 611, 18 N.W. 2d 331 and *Baker* v. *Department of Taxation*, (1947) 250 Wis. 439, 27 N.W. 2d 467, did respond to the request of the assessor of incomes in those years to file returns for those years. Thereafter the

assessor made additional assessments against him asserting that he was liable to taxation and the procedural review proceedings previously mentioned were all followed and ultimately the Supreme Court of Wisconsin affirmed the holding that he was domiciled in the state of Wisconsin in the years 1941 and 1942.

However, as respects the years 1943, 1944 and 1945, which are here involved, the Appellant wholly refused to make any response to demands by the assessor of incomes that he file income tax returns. He asserted that he was domiciled in the state of Michigan and therefore he did not have to file any return. The assessor of incomes of the Milwaukee district maintained that Mr. Baker was liable to Wisconsin income taxation for those years and ultimately, after several requests for filing of returns, gave him notices of doomage assessments in respect to those years. The Appellant failed and refused to file returns during and within the 10 days after the receipt by him of the notices of doomage assessments. These doomage assessments were found by the trial court to have been made upon due and proper notice and in accordance with the provisions of sec. 71.09 (6).

The doomage assessments did not state any particular grounds or basis upon which they were made but merely notified the taxpayer that an assessment of income was being made against him for each of those years, namely $13,000 for 1943, $14,000 for 1944 and $13,000 for 1945. No response having been received from the taxpayer after the service upon him of the "doomage" assessment notices the tax rates provided by the statutes and the exemptions were applied thereto and the resultant taxes were placed upon the tax roll. [pp. 45-46 of Appellant's Jurisdictional Statement.] Thereafter, pursuant to express provisions in the Wisconsin statutes, a warrant was issued for

the collection of such taxes, which warrant has the effect of a judgment when recorded in the office of the clerk of the circuit court. It is enforced by the issuance of an execution the same as a judgment. The assessor of incomes did threaten to issue an execution or have an execution issued on this warrant and deliver it to the sheriff so as to enforce these taxes.

The Appellant-Taxpayer thereupon commenced the injunction proceedings here involved in the Circuit Court for Milwaukee County against the assessor of incomes, the sheriff and the Wisconsin Department of Taxation. The answer to the Amended Complaint put in issue all of his assertions that he was not liable to taxation under the Wisconsin statutes. The case was tried and so far as the Appellant-Taxpayer is concerned entirely upon the theory that the facts showed he was domiciled in the state of Michigan and he made no endeavor to predicate his case on any other theory or basis than that. After the factual situation as adduced at the trial was held by the circuit judge to establish that he was domiciled in Michigan but that nevertheless the facts showed that he spent in the aggregate more than seven months in the state of Wisconsin in each of the years and therefore the assessment was sustainable under the language in sec. 71.01, the Appellant then endeavored to come in and assert for the first time that the provisions of sec. 71.01 under which he had been proceeding and claiming to be excluded from taxation were unconstitutional and invalid. He had elected to resist the assessment and to conduct the trial entirely upon the proposition that he was not domiciled in the state of Wisconsin during these years but was domiciled in the state of Michigan.

The answer to the Amended Complaint was responsive to the Amended Complaint and put in issue the assertions of the Appellant that he did not come within the language

of the Wisconsin statutes relating to liability for Wisconsin income taxation. Paragraph 9 of the Amended Complaint specifically denied the allegation in the Amended Complaint that the assessor of incomes at all times involved knew that the Appellant was not a resident of the state of Wisconsin in the years involved. Paragraph 10 admitted that the assessor of incomes knew that the Appellant *claimed* he was not a resident of the state of Wisconsin during the years involved. Paragraph 11 specifically denied that the Appellant was a nonresident of the state of Wisconsin during the years involved. Paragraph 29 of the Answer denied that the assessment for the income taxes for the years involved were void for the reasons set forth in the Complaint. Finally Paragraph 32 of the Amended Complaint alleged specifically that all acts done were done and performed pursuant to the provisions of the Wisconsin statutes. The only provision or content in the Answer to the Amended Complaint that was responsive to any assertion of unconstitutionality was in Paragraph 31, which specifically denied the assertion that the provisions of sec. 71.09 (6) were void or violative of any provision of either the Constitution of the United States or of the State of Wisconsin.

Under the state of the pleadings it was incumbent upon the Appellant in asserting that the assessments made were not made pursuant to any provisions of the statutes to present facts which showed that he did not come within any of the provisions of sec. 71.01, Stats., which are the statutory authorizations for the assertions of income tax liability. This section imposes income tax liability upon either jurisdiction over the person receiving the income or jurisdiction over the property from which the income is derived. It was jurisdiction over the person that was here involved. Jurisdiction over the person is asserted in this section by imposing tax liability on "every person residing within

the state." It is then specified when a person is "residing in the state" for such purposes. A natural person "domiciled in the state" is stated to be residing in the state. A natural person "who maintains a permanent place of abode within the state" is stated to be residing therein. Finally a natural person who "spends in the aggregate more than seven months of the income year within the state" is stated to be residing therein.

In order for Appellant to maintain that there was no provision in the statutes of Wisconsin upon which the assessment could be grounded and therefore invalid as unauthorized by any provision of the statute, it was incumbent upon him to assert and prove facts which showed that none of those grounds set forth in the statute actually existed. It was not sufficient for him to prove facts that show only one of the grounds did not exist. It was the Appellant who had taken on the burden of disproving statutory authorization for the assessment. If any of the statutory provisions to which he attempted to apply the facts were claimed by him to be invalid and unconstitutional it was incumbent upon him to assert it. But, this he did not do. He made no charge of any kind that any provision in sec. 71.01 was invalid. What he tried to do was to maintain that the facts showed that he did not come within any of those provisions.

He did not prove factually that he did not spend more than seven months in the aggregate in the state in each of the years involved. He testified in respect to the period of time that he spent in the state in each of the years. But he made absolutely no assertion at the trial that the seven months' provision or any other provision of the statute, sec. 71.01, was unconstitutional or invalid. He claimed that he did not come within the terms of the statute. The only

challenge he made was as to the validity of sec. 71.09 (6), Stats. as previously stated.

Here Appellant endeavors to do the same that he tried to do before the Supreme Court of Wisconsin. He attempts to excuse his failure to make a timely challenge of the validity of the seven months provision of sec. 71.01 by claiming failure or something on the part of the Respondents to specifically ground the assessment thereon. As previously stated it was his burden to challenge the assessment and he elected to challenge it on the grounds that factually he did not come within any of the provisions of sec. 71.01. It is not as though Appellant was not well aware at the trial of the force of this seven months provision. It was not something new to him or that he had not heard of before. Even if, as a matter of pleading, (which is expressly denied) there was nothing to make him aware of the applicability thereof, the cross examination at the trial, consuming 42 pages of transcript, wherein all of the details relative to the time he spent in and out of the state were gone into most thoroughly, should have meant something to him. As further evidence of consciousness on his part of the impact of this seven months provision is his testimony in the record that Mrs. Baker submitted her own personal income tax returns "because she did not want to be obliged—as I thought the law was—to be out of Wisconsin five months of the year." [p. 42 of Appellant's Jurisdictional Statement]. This testimony was on cross examination. But, in addition thereto upon direct examination he testified as his conclusion that during the three years involved he spent "much less than seven months here and spent more in days outside of the state—much more than the five months out of Wisconsin." [p. 42 of Appellant's Jurisdictional Statement]. Here he was testifying on direct examination in presenting his own case.

These two instances, and other testimony throughout the case, conclusively show that at all times during the case the Appellant was conscious of the impact of the seven months provision and he was endeavoring to and did assert that the facts not only proved that he was not domiciled in the state of Wisconsin but that he did not spend an aggregate of more than seven months in any of the years in the state of Wisconsin. His endeavor in this regard was the same as it was in respect to the domicile language. He was contending that the facts showed that he did not come within the language of the provisions respecting domicile, permanent place of abode and seven months spent in the state. Nowhere in the case did he challenge the validity of any of these provisions until after the trial was over and he found that he had not been successful in his approach to the case and the way he had it tried of endeavoring to maintain that factually he did not come within any of the provisions in sec. 71.01, Stats.

The Appellant did not narrow his challenge of the validity of the assessment down to the mere question of whether or not factually he was domiciled in the state of Wisconsin in the years but, being well aware of the other provisions of sec. 71.01, alleged that he was not a "resident" of Wisconsin during the years involved.

In Paragraph 6 of the Amended Complaint it is asserted the Appellant was "not a resident" in Wisconsin in the years involved. In Paragraph 9 of the Complaint it is asserted that the assessments are wholly void because he was not "a resident" and "at no time in either of said years lived or resided in Wisconsin * * *." [pp. 40 and 41 of Appellant's Jurisdictional Statement.] Paragraph 9 of the Answer denies the allegations of Paragraph 6. [p. 55 of Appellant's Jurisdictional Statement.] Paragraph 11 of the Answer specifically denies that he

"was a nonresident of the state" during the years involved. [p. 55 Ap. to Appellant's Jurisdictional Statement.] Thus, nowhere in the Answer is there any grounding of the assessment solely upon the basis of domicile in the state. The pleadings were responsive to the pleadings of the Appellant and asserted validity of the assessment as being within the language of sec. 71.01. If there be any deficiency in this regard in the pleadings it was because the Appellant, upon whom fell the burden of showing the basis upon which he had challenged the assessment, did not plead with particularity.

As nothing in the answer in any way rested the asserted tax liability solely upon domicile the Appellant could have produced facts that would negate any or all the grounds of personal jurisdiction set forth in sec. 71.01. Had the facts which were adduced at the trial showed he was not domiciled in Wisconsin, did not maintain a permanent place of abode in Wisconsin, and did not spend more than seven months in the aggregate in any year in the state, then he would have proved his case. He undertook to prove that he did not come within any of the language of sec. 71.01. However, if the facts adduced did not prove that none of said grounds existed but that one of them did, which was the case here, then he could not prevail as he had failed to carry the burden of factual proof that rested upon him of establishing his assertion that there was no provision in the statutes of Wisconsin that covered him and subjected him to Wisconsin income tax liability. If he did not want to present facts on any or all of the three bases for personal jurisdiction or if the facts presented did not sustain him on any of said grounds, then the only way he could prevail in the case was to challenge the validity of such grounds. But this he did not do until after the factual presentation had gone against him and after he had elected not to chal-

lenge the statute but attempt to disprove application of it on a factual basis. By that time it was too late for him to challenge the validity of this statute.

It is abundantly clear from the entire record in the case that the only challenge which the Appellant intended to and did make below so far as constitutionality is concerned was in respect to subsec. (6) of sec. 71.09 and then not in its entirety but only in respect to the provision therein prohibiting challenging of the validity of a doomage assessment once the same had been made and entered on the roll.

Neither the trial court nor the Supreme Court of Wisconsin passed upon the question of constitutionality of the seven months provision in sec. 71.01. It was not presented to the trial court during the trial and so far as the defendants in that trial were concerned there was no indication that the Appellant as the plaintiff in the case below was challenging the validity of any provision of sec. 71.01. The declination of the lower court and of the Supreme Court of Wisconsin to pass upon the constitutionality of this provision under these circumstances is well grounded. Counsel below tried the case upon the Appellant's theory which was that he did not come within any of the language in sec. 71.01. Obviously the presentation of the facts, cross examination and direct examination, as well and direct evidence presented by the defense, was all conducted and presented in view thereof. Had there been a challenge of the constitutionality of any of the provisions of sec. 71.01 the factual presentation below might have been and would have been conducted in perhaps a very different and much more extensive manner. Where unconstitutionality of a statute is asserted there are many factual bases which should be presented and gone into with much more particularity and much more extensively than where the case is merely a question of whether or not the facts bring the case within

certain language in the statute which is not challenged as to its validity. It is most unfair to conduct the case upon the basis of a question of whether or not the statute is applicable by its terms and then after the factual presentation is made that demonstrates applicability to come along and then assert unconstitutionality. There are many things that might have been gone into quite differently and much more elaborately were there challenge of unconstitutionality. It seems obvious that it should be well understood that where there is a challenge of unconstitutionality in a case there are many facts and situations which would be gone into and produced which may not be necessary and would not be produced in a case where it is solely a matter of application of the statutes to a particular set of facts.

The inference at pages 9 and 10 of the Appellant's Jurisdictional Statement that in the two previous cases, *Baker v. Department of Taxation*, (1945) 246 Wis. 611, 18 N.W. 2d 331, involving income of the year 1941 and *Baker v. Department of Taxation*, (1947) 250 Wis. 439, 27 N. W. 2d 467, involving the year 1942, there was no reference or concern as to the seven months provision in sec. 71.01 is absolutely erroneous. Obviously as both the lower court and the Supreme Court in those two cases found that the facts establish that he was domiciled in the state of Wisconsin in both of those years there was no occasion for the court to give any attention to the seven months provision. However in the record of those cases there is a considerable amount of testimony which goes into the detail of the time that he spent in the state of Wisconsin and the Appellant himself made statements in those cases to the same effect as he did in the instant case that the time which he had spent out of the state on week ends, etc. totalled more than five months and that his calculations of the time that he

had spent in the state of Wisconsin in each of those years was less than seven months. The question of the applicability of the seven months provision was clearly in both of those cases, but because of the finding that he was actually domiciled in the state there was no necessity for grounding the assessment upon that basis.

The statement at page 10 of Appellant's Jurisdictional Statement relative to testimony of the Appellant that he discontinued keeping a record of the time spent in and out of the state of Wisconsin in the years 1944 and 1945 shows that it was his own error in concluding as to what was the grounded basis for the assessment in the instant case. He assumed to determine for himself what basis there was for the assessment and for income tax liability under the statutes and elected to ground his case entirely upon the question of whether or not factually he was domiciled in the state. But at the same time he did not ignore or overlook the provisions respecting seven months residence in the state.

In his own testimony on direct examination he was asked by his own counsel the following questions:

> "Q. How much of the time during 1943 did you spend in Wisconsin?
>
> "A. Well, in 1943, 1944 and 1945 also I spent much less than the seven months here and spent more in days outside of the state—much more than the five months out of Wisconsin.
>
> "Q. That obtained in each of the years 1943, 1944 and 1945?
>
> "A. It does, Yes."

Better than 30 pages of the transcript of the Testimony deals with cross examination of the details and times that the Appellant claimed that he spent out of the state of Wisconsin in the years involved. As against this it seems rather difficult for him to assert that he was not aware of the impact of the seven months provision in the statute.

He stated in his testimony on redirect examination that he discontinued keeping a record of his absences from the state in 1944 and 1945 as follows:

> "Q. Mr. Baker, why did you discontinue keeping a record of your absences from Wisconsin for the years 1944 and '45?
>
> "A. Because of the decision of the Board of Tax Appeals and of the Supreme Court in the previous case that apparently did not make any issue upon the provision of that statute that requires one to submit a report if he had been a resident for five months in the state. I had argued before both bodies that it was not applicable and if applicable was unconstitutional and that in no sense was it more than a mere presumption, and cited authorities to that effect and concluded that that wasn't claimed any longer; that it was based—that my liability was based entirely upon being domiciled in Wisconsin as these decisions said."

He relies entirely upon this statement as being sufficient to ground his assertion that he was not aware of and that there was no assertion upon behalf of the defendant in the trial of the case that the seven months provision might be involved. He makes this notwithstanding, as previously stated, that many pages of the transcript are devoted to a very detailed examination of the days, time and dates that he spent out of the state of Wisconsin and that he spent in the state of Wisconsin. The matter was gone into very thoroughly and covered the entire year 1943. After that he then testified that the years 1944 and 1945 were similar and alike in this respect. It stands not well for him now to say that he had no indication or suggestion in the trial that the seven months provision might be involved. The only reason that he did what he did at the trial was because he himself elected to try the case solely upon the matter of domicile and completely ignore and pass over any other consideration. Thus, it is his own waiver that put him in

the position where he could not and did not challenge the constitutionality until after the case was all over.

It is therefore submitted that no substantial federal question is presented in this case under the circumstances here existent.

Respectfully submitted,

VERNON W. THOMSON
Attorney General of Wisconsin,
HAROLD H. PERSONS
Assistant Attorney General
Attorneys for State of Wisconsin

(4807)

IN SUPREME COURT, STATE OF WISCONSIN

AUGUST TERM, 1950

No. 55

NORMAN L. BAKER,

Appellant,

vs.

JOHN H. LEENHOUTS, WISCONSIN DEPARTMENT OF TAXATION, AND GEORGE M. HANLEY, SHERIFF

REPLY TO APPELLEE'S STATEMENT OPPOSING JURISDICTION

The one new matter set forth in the statement opposing jurisdiction raises the question as to whether the case is moot. It is believed that this argument, heretofore raised in this matter by appellee's brief before the Supreme Court of Wisconsin, but undecided by that court, really involves the question as to whether the action abates by reason of the retirement of a state public official from office.

For nearly one hundred years, the Supreme Court of the State of Wisconsin has held that where a state officer is sued with respect to the conduct of his official duties, the action does not abate, and may be enforced by or against his successor. Thus in mandamus actions to compel a public official to perform his duty to levy and collect taxes or to pay an indebtedness of the state, the court may order

and has ordered a peremptory writ of mandamus to issue directed to and enforced upon the successor in office. *State ex rel Bushnell* v. *Gates, Clerk*, 22 Wis. 10; *State ex rel Sloan, Stevens and Morris* v. *Warner, Sec. of State*, 55 Wis. 271; *State ex rel Burnham* v. *Cornwall*, 97 Wis. 567. In the *Warner* case, the Supreme Court Judgment ends with the order (page 287), "that a peremptory writ of mandamus be issued, directed to the present Secretary of State of the State of Wisconsin, commanding him to audit and allow the relator's claim * * *".

If a successor can be ordered to perform a duty devolving upon the predecessor, no reason is seen why the predecessor cannot be ordered to refrain from an illegal performance of duty threatened by his predecessor. Nor is Appellee's argument that the Wisconsin Department of Taxation cannot be sued founded upon reason or authority.

The organization of the Department of Taxation is covered by Sections 73.02 and 73.03 of Wisconsin Statutes 1949. Section 73.02(1) creates a State Department of Taxation consisting of a Commissioner of Taxation and such other officers and employees as may be hereinafter authorized.

Section 73.03 states, "It shall be the duty of the Department, and it shall have power and authority:". Then follows twenty-five sub-sections defining the powers and duties of the Tax Department, including authority to the Attorney General to appear for the Department in all courts. In actual practice, the Department not only supervises the enforcement of all tax laws, but with respect to income taxes receives payment under such title and issues warrants to the Sheriff for collection by the use of such name. In practically all, if not all, cases involving income tax litigation, the Department is named a party and represents the State.

By Paragraph 26 of the Answer to the Amended Complaint herein, it is specifically admitted that the defendants, Wisconsin Department of Taxation and John H. Leenhouts, intend to enforce the claim of the State of Wisconsin for the Wisconsin income taxes so assessed, with the penalties, interests and costs as provided by law, and to that end will, and *it is their duty to*, use any and all of the remedies provided by Statute.

The duties having been specifically imposed upon the Department, it is not appreciated how any other person could properly be sued. The individuals making up the Department are not acting in the furtherance of any duty imposed upon them as individuals but solely in the furtherance of the duty imposed upon the artificial being or entity, the Wisconsin Department of Taxation. In any event, the objection not having been taken by demurrer or answer, or having in any way been raised before the courts of Wisconsin, it must be deemed waived.

It is respectfully submitted that the court has jurisdiction to entertain the appeal.

Dated at Milwaukee, Wisconsin, this 23rd day of April, 1951.

LOUIS QUARLES,
NORMAN J. BAKER,
Counsel for Plaintiff-Appellant.

INDEX

Subject Index

	Page
Statement as to jurisdiction	1
Opinions below	1
Jurisdiction	2
Question presented	5
Statute and administrative rule involved	5
Statement	6
The questions are substantial	10
Conclusion	15
Appendix "A"—Opinion of the Supreme Court of Wisconsin	16
Appendix "B"—Opinion of the Supreme Court of Wisconsin on rehearing	24
Appendix "C"—Rule II of the Commissioner of Banks of Wisconsin	25

Table of Cases Cited

Armstrong Paint & Varnish Works v. *Nu-Enamel Corp.*, 305 U. S. 315, 83 L. ed. 195	4
Asbury Hospital v. *Cass County*, 326 U. S. 207, 90 L. ed. 6	4
Atchison, Topeka & S. F. R. Co. v. *Vosburg*, 283 U. S. 56, 59 L. ed. 1199	11
Barrett v. *Indiana*, 229 U. S. 26, 57 L. ed. 1050	10
Bayside Fish Flour Co. v. *Gentry*, 297 U. S. 422, 80 L. ed. 772	11
Capitol Greyhound Lines v. *Brice*, 339 U. S. 542, 94 L. ed. 1053	10
Central Lumber Co. v. *South Dakota*, 226 U. S. 157, 57 L. ed. 164	10
Charleston Federal Savings & Loan Association v. *Alderson*, 324 U. S. 182, 89 L. ed. 857	4
Coleman v. *Miller*, 307 U. S. 433, 83 L. ed. 1385	4
Connecticut Mutual Life Ins. Co. v. *Moore*, 333 U. S. 541, 92 L. ed. 863	4
Cotting v. *Godard*, 183 U. S. 79, 46 L. ed. 92	14
Engel v. *O'Malley*, 219 U. S. 128, 55 L. ed. 128	14
General Motors Acceptance Corp. v. *Commissioner of Banks of Wisconsin*, 258 Wis. 56, 45 N. W. (2d) 83	1

199624

	Page
Goessaert v. *Cleary*, 335 U. S. 464, 93 L. ed. 163	10
Hamilton v. *Regents of the University of California*, 293 U. S. 245, 79 L. ed. 343	4
Illinois ex rel. McCollum v. *Board of Education*, 333 U. S. 203, 92 L. ed. 649	4, 5
Kotch v. *River Port Pilot Commissioners*, 330 U. S. 552, 91 L. ed. 1093	4, 11
Lake Erie & Western R. Co. v. *State Public Utilities Commission, ex rel. Cameron*, 249 U. S. 422, 63 L. ed. 684	5
Minnesota ex rel. Pearson v. *Probate Court*, 309 U. S. 270, 84 L. ed. 744	11
National Labor Relations Board v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 81 L. ed. 893	10
Nickey v. *Mississippi*, 292 U. S. 393, 78 L. ed. 1323	3
Quaker City Cab Co. v. *Pennsylvania*, 277 U. S. 389, 72 L. ed. 927	11
Railway Express Agency v. *New York*, 336 U. S. 106, 93 L. ed. 533	10, 11
Savich v. *Hines*, 174 Wis. 181, 182 N. W. 924	4
Smith v. *Cahoon*, 283 U. S. 553, 75 L. ed. 1264	11
United Public Workers v. *Mitchell*, 330 U. S. 75, 91 L. ed. 754	4
United States v. *Carolene Products Co.*, 304 U. S. 144, 82 L. ed. 1234	10
United States v. *Petrillo*, 332 U. S. 1, 91 L. ed. 1877	10
United States v. *Wimbish*, 154 F. (2d) 773	4
West Coast Hotel Co. v. *Parrish*, 300 U. S. 379, 81 L. ed. 703	11
Whitfield v. *Ohio*, 297 U. S. 431, 80 L. ed 778	3

STATUTES CITED

Constitution of the United States, 14th Amendment	5, 15
Public Utility Holding Company Act of 1934, 15 U.S.C. 79	14
Rule II of the Commissioner of Banks of Wisconsin	3, 25
United States Code, Title 28, Section 1257(2)	4
Wisconsin Statutes of 1935, Chapter 474, p. 748	5
Wisconsin Statutes of 1937, Section 2 of Chapter 417, pp. 688, 691	5
Wisconsin Statutes of 1945, Chapter 227	4
Wisconsin Statutes of 1949, Section 218.01	5, 7, 8

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 746

GENERAL MOTORS ACCEPTANCE CORPORATION,
Appellant,

vs.

COMMISSIONER OF BANKS OF THE STATE OF WISCONSIN,
Appellee

APPPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, appellant submits herewith its statement particularly disclosing the basis upon which the Supreme Court of the United States has jurisdiction on appeal to review the final decree and judgment of the Supreme Court of Wisconsin entered in this cause.

Opinions Below

The first opinion of the Supreme Court of Wisconsin is reported in 258 Wis. 56, 45 N. W. 2d 83 (1950). A copy of

that opinion is attached hereto as Appendix A. The opinion of the Supreme Court of Wisconsin upon rehearing is reported in 258 Wis. 64a, 46 N. W. 2d 328 (1951). A copy is attached hereto as Appendix B.

Jurisdiction

The jurisdiction of the Supreme Court of the United States is invoked under 28 U. S. C. § 1257 (2).

1. The Supreme Court of Wisconsin affirmed a judgment against appellant on December 5, 1950. A timely petition for rehearing was denied upon its merits on February 6, 1951, with an opinion. The decree and judgment of the Supreme Court of Wisconsin, the court of last resort in the State of Wisconsin, is final. The petition for appeal was presented to the Chief Justice of the Supreme Court of Wisconsin on April 27, 1951.

2. In its petition to the court of the first instance (the Circuit Court of Dane County, Wisconsin), appellant requested judgment that Rule II of the Commissioner of Banks, promulgated under Section 218.01 of the Wisconsin Statutes, was, as applied to appellant, arbitrary, capricious, without sound basis in fact and impaired the constitutional rights and privileges of the petitioner.[1] Appellee's answer specifically denied these allegations, and in its conclusions of law and judgment, the court of the first instance specifically held that Rule II was valid and constitutional.

Errors of lower courts in Wisconsin are not brought to the attention of the Supreme Court of Wisconsin by a formal document made a part of the record. Assignments of error are presented in appellants' briefs by a statement entitled "Questions Involved". Appellant here duly pre-

[1] Other grounds for the petition, based upon state law, are, of course, not now in issue.

served its contention that Rule II as applied, violated the Fourteenth Amendment. In its first opinion, the Supreme Court of Wisconsin did not specifically refer to the constitutional questions raised by appellant. Appellant's brief upon its petition for rehearing again urged the constitutional points, in particular its contentions that appellee's Rule II promulgated under Section 218-01 of the Wisconsin Statutes, as construed by the Commissioner of Banks and the Supreme Court of Wisconsin, denied to appellant that equal protection of the laws and due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

The following paragraph appears in the opinion of the Supreme Court of Wisconsin upon the denial of the petition for rehearing:

> "Upon the motion for rehearing, the petitioner, General Motors Acceptance Corporation, states that, in its decision herein, the court made no reference to a constitutional question raised upon the appeal. The petitioner contended then, and does now upon this motion, that the ruling of the Commissioner of Banks and the decision of this court result in a denial to petitioner of the equal protection of the laws and a deprivation of its property without due process of law, each of which is guaranteed by the Fourteenth Amendment to the Constitution of the United States. Although it was not specifically referred to in the opinion, the court considered this contention and deemed it to be without merit."

In view of this explicit ruling upon the Federal questions raised by appellant, further search of the record for the manner in which the Wisconsin statute and administrative rule were drawn in question becomes unnecessary. *Whitfield* v. *Ohio*, 297 U. S. 431, 435-436, 80 L. Ed. 778, 782 (1936); *Nickey* v. *Mississippi*, 292 U. S. 393, 78 L. Ed. 1323

(1934); *Charleston Federal Savings & Loan Association* v. *Alderson*, 324 U. S. 182, 89 L. Ed. 857 (1945). See also *id.*, 324 U. S. at page 186, footnote 1, and cases there cited, as to certificates of state courts.

3. This action began as a petition for a declaratory judgment under the provisions of Chapter 227 of the Wisconsin Statutes, 1945. Appellant alleged, and appellee admitted in its written answer, that the Commissioner of Banks had threatened the appellant with revocation of its license to engage in the finance business in Wisconsin. This unamended admission is binding on appellee. *Savich* v. *Hines*, 174 Wis. 181, 182 N. W. 924 (1921) and cases cited; *United States* v. *Wimbish*, 154 F. 2d 773 (C. C. A. 4th 1946); *Armstrong Paint & Varnish Works* v. *Nu-Enamel Corp.*, 305 U. S. 315, 83 L. Ed. 195 (1938). Appellant's standing to maintain its action in this Court is thus based not upon the academic and abstract general interest of some of the appellants in *United Public Workers* v. *Mitchell*, 330 U. S. 75, 91 L. Ed. 754 (1947). General Motors Acceptance Corporation is rather in the position of those against whom a "direct threat" has been made. It is, therefore, entitled to be heard upon the merits in this Court. *United Public Workers* v. *Mitchell*, *supra*, at page 88, and cases there cited; *Connecticut Mutual Life Ins. Co.* v. *Moore*, 333 U. S. 541 at 550, 92 L. Ed. 863 at 871 (1948); *Asbury Hospital* v. *Cass County*, 326 U. S. 207, 90 L. Ed. 6 (1945). See *Kotch* v. *River Port Pilot Commissioners*, 330 U. S. 552, 91 L. Ed. 1093 (1947). Compare also *Illinois ex rel. McCollum* v. *Board of Education*, 333 U. S. 203 at 206, 92 L. Ed. 649 at 656 (1948); *Coleman* v. *Miller*, 307 U. S. 433, 443, 445, 83 L. Ed. 1385, 1391, 1392 (1939).

4. It is clear that an administrative rule, such as the one here involved, which has the force and authority of statute, is a "statute" within the meaning of 28 U. S. C. § 1257 (2). *Hamilton* v. *Regents of the University of California*, 293

U. S. 245, 79 L. Ed. 343 (1934); *Lake Erie & Western R. Co. v. State Public Utilities Commission ex rel. Cameron*, 249 U. S. 422, 424, 63 L. Ed. 684, 687 (1919); *Illinois ex rel. McCollum v. Board of Education*, 333 U. S. 203 at 206, 92 L. Ed. 649 at 656 (1948).

Question Presented[3]

In the regulation of the maximum "dealer participation" which may be paid by licensed finance companies, may the State of Wisconsin, consistent with the equal protection clause of the Fourteenth Amendment, differentiate between finance companies so as to require insurance commissions paid to an automobile dealer by an insurance company to be taken into account, as part of dealer participation permitted to be paid by a finance company, when such insurance commissions are paid by an insurance company which is so related to a finance company that the two are deemed to be "separate corporations in name only," but not to so treat insurance commissions when they are paid by an insurance company not so related to a finance company.

Statute and Administrative Rule Involved

Chapter 474, Wisconsin Session Laws, 1935, p. 748; Section 2 of Chapter 417, Wisconsin Session Laws, 1937, pp. 688, 691, and amendments thereto, presently found in Section 218.01(5)(c), Wisconsin Statutes, 1949, authorizes the Commissioner of Banks of the State of Wisconsin to "make such rules and regulations as [he] shall deem

---

[3] While only the principal issue is summarized under this heading and discussed in this Statement, each assignment of error is presented, including the issue also raised below, to the effect that the administrative agency's application of the statute in excess of his statutory power constitutes a denial of due process of law.

necessary or proper for the effective administration and enforcement of this section * * *". Purportedly under this section of the Wisconsin Statutes, the Commissioner of Banks promulgated Rule II set out in Appendix C attached hereto. Appellant's challenge of this Rule, as applied, rests upon the interpretation of the Rule by the Supreme Court of Wisconsin in that court's opinions set out in Appendices A and B attached hereto.

Statement

The GM "Family"

General Motors Acceptance Corporation (called GMAC) is a New York corporation which has been licensed to do business in Wisconsin for many years by that state's Secretary of State. It is a wholly owned subsidiary of General Motors Corporation (GM), a Delaware corporation. GMAC, in turn, owns all of the capital stock of Motors Insurance Corporation (MIC), a New York insurance company which has been licensed to do business in Wisconsin since 1941 and which charges the same standard rates as any other automobile stock insurance company doing business in the state.

The Automobile Finance Business

A brief summary of the operation of the automobile finance business is necessary for an understanding of the issue presented.

In an instalment sale transaction, an automobile dealer agrees in writing with the purchaser of a new or used car that less than the full time price of the car shall be paid at the time of the delivery of the car with the balance to be paid in instalments over a period of time. The time price exceeds the cash sale price by the amount of the finance

charge. A majority of dealers sell their "time paper" to finance companies, such as GMAC, which buy the paper at a discount equal to the finance charge.

The amount of the finance charge is set primarily by competition. Out of the discount, the finance companies pay to the dealer an amount known as dealer participation or dealer reserve which payment is recognized as legitimate and, within the maximum limits, is permitted by the Rule involved here.

Cars sold on time must be insured at the buyer's expense against the casualties of fire, theft and collision. The buyer may get this insurance from whomever and wherever he wishes.

During the 1920s and early 1930s, abuses developed in the automobile finance business. One such abuse, a perversion of the normal, legitimate "dealer participation", was called the "pack". The "pack" was an unwarranted sum added by less scrupulous dealers, over and above any legitimate finance charge, and concealed from the buyer. Some finance companies cooperated with these dealers so as to permit the dealer to realize these excessive sums.

Wisconsin Legislation

In 1935 the State of Wisconsin enacted what is now Section 218.01 Wisconsin Statutes of 1949, to correct various financing abuses. Finance companies and retail automobile dealers were required to secure a license from the Commissioner of Banks (then called the Banking Commission). The abuses were to be eliminated by requiring delivery to the buyer of an itemized statement of each charge, including insurance premiums, going into the time sale transaction so that the purchaser would know precisely what he was paying for. § 218.01(6), Wis. Stats., 1949. The whole object of the act was to bring about complete disclosure of

time price factors which would effect the elimination of hidden or fraudulent charges.

The Commissioner of Banks was given the usual power to pass rules and regulations for the administration of the statute. § 218.01(5)(c). Presuming to act under this authority, the Commissioner promulgated his Rule II, which set limitations upon the amount of dealer participation which might be paid to dealers by finance companies.

With the basic purpose of this Rule appellant had and has no quarrel. The Commissioner, however, subsequently interpreted his Rule in a fashion which appellant asserted was beyond his statutory authority. The Commissioner contended that *insurance commissions* paid out of insurance premiums by insurance companies to their agents for writing insurance on cars sold on time were to be treated as a part of "dealer participation" in determining the maximum dealer participation permitted to be paid by the finance company if the insurance agent was also an automobile dealer who sold the time paper on the car in question to the finance company. Under the Commissioner's interpretation, these insurance commissions had to be added to "dealer participation" received from a finance company to determine whether the total amount which the finance company could pay the dealer exceeded the limitations established by Rule II.

The Present Action

Appellant brought the present action in the Circuit Court for Dane County, Wisconsin, praying judgment that such interpretation and application of the Rule by the Commissioner was in excess of his power and authority.

The circuit court held against appellant's contentions. Appellant appealed to the Supreme Court of Wisconsin, and

it is the action of the Wisconsin court of last resort which brings appellant to this Court. The Wisconsin court did not hold that insurance commissions are, in fact, dealer participation under the Wisconsin statute. It held, in effect, that insurance commissions are *not* dealer participation—but that because *GMAC* is so closely related to MIC, which writes insurance on some GMAC-finance cars, the Commissioner's regulation *as applied to GMAC* could be enforced against *it*. GMAC's arguments that dealer participation does not include insurance commissions, the Wisconsin court held, were "convincing" but for its conclusion that GMAC and MIC are "separate corporations in name only".

Thus by a combination of administrative and judicial interpretation, the Wisconsin statute regulating finance companies has singled out appellant (and any other finance company which the court might deem to be one and the same with an insurance company, though they are separate corporations) for regulation of a far more strict character than is imposed upon a finance company independent of any insurance company. GMAC must subtract the insurance commissions its subsidiary, MIC, pays to such of its agents who may be dealers, from the amount of dealer participation GMAC would otherwise be permitted to pay such dealers under Rule II. Finance companies who do not own (or at least are not closely affiliated with) insurance companies are subjected to no such limitation. They may pay the dealer the full dealer participation permitted by the Rule, without taking into account the insurance commissions paid to the dealer by an independent insurance company.

Appellant asserts here that such differentiation in treatment of finance companies is of a character which results in a denial to appellant of equal protection.

The Questions Are Substantial

1. *The Standard to be Applied.* We do not expect this Court to hold that because Wisconsin "has prohibited some practices within its power to prohibit, it must prohibit all within its power", *United States* v. *Petrillo*, 332 U. S. 1, 8, 91 L. Ed. 1877, 1883 (1947). That is not this Court's province, as it has repeated in varying forms in numerous opinions. But this does not alter the rule that there must be some rational basis for regulating one person "that would not require with equal force its extension to others * * *." *Barrett* v. *Indiana*, 229 U. S. 26, 30, 57 L. Ed. 1050, 1053 (1913), and cases there cited. Without the latter rule, the equal protection clause would mean nothing, and in each of the cases in which this Court has warned that Congress or a legislature need not prevent all the evil within its power, this qualification has, in fact, been clearly expressed or implied.

The "rational basis" for the failure to extend the regulation to others has, of course, taken varying forms. Familiar examples are the administrative or other difficulties present in extending regulation to all within a class, *United States* v. *Carolene Products Co.*, 304 U. S. 144, 154, 82 L. Ed. 1234, 1243 (1938); *Railway Express Agency* v. *New York*, 336 U. S. 106, 93 L. Ed. 533 (1949); compare *Capitol Greyhound Lines* v. *Brice*, 339 U. S. 542, 94 L. Ed. 1053 (1950); the fact that the one regulated is a more conspicuous example of the evil, *Central Lumber Co.* v. *South Dakota*, 226 U. S. 157, 160-161, 57 L. Ed. 164, 169 (1912); see *United States* v. *Petrillo, supra;* the cautious, step-by-step advance which a legislative body may wish to undertake, *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 46, 81 L. Ed. 893, 917 (1937); the fact that factors balancing the evil may be at work in a section of the class left unregulated, *Goesaert*

v. *Cleary*, 335 U. S. 464, 466, 93 L. Ed. 163, 166 (1948); or simply that the legislature may have believed that the evil was worse in one case than it was in another. *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379, 400, 81 L. Ed. 703, 713 (1937); *Minnesota ex rel. Pearson* v. *Probate Court*, 309 U. S. 270, 275, 84 L. Ed. 744, 750 (1940). It suffices to say that some practical or logical reason for the failure to extend the regulation to others has been present in each case in which a statute has been upheld.

Another qualification must be noted. The legislative discrimination must bear some reasonable relation to an object sought to be accomplished by the statute in question. A great many cases support this principle, as Mr. Justice Jackson noted in his concurring opinion in *Railway Express Agency* v. *New York, supra*, 336 U.S. at 111, 115. See, for example, *Kotch* v. *River Port Pilot Commissioners*, 330 U.S. 552, 556, 91 L. ed. 1093, 1097 (1947); *Atchison, Topeka & S.F.R. Co.* v. *Vosburg*, 283 U.S. 56, 59 L. ed. 1199 (1915); *Smith* v. *Cahoon*, 283 U.S. 553, 75 L. ed. 1264 (1931); *Bayside Fish Flour Co.* v. *Gentry*, 297 U.S. 422, 429, 80 L. ed. 772, 777 (1936). See Brandeis and Holmes, JJ., dissenting in *Quaker City Cab Co.* v. *Pennsylvania*, 277 U.S. 389, 403 at 406, 72 L. ed. 927, 931 at 932 (1928).

The question to be answered by this Court, then, is whether Wisconsin's attempt to treat dealer participation differently in the case of finance companies with closely affiliated insurance companies than in the case of finance companies which are not, bears any reasonable relation to the objects of regulating dealer participation.

2. *The Reason Dealer Participation Was Regulated.* In 1934 the "Wisconsin State Banking Commission and Interim Advisory Legislative Committee To Investigate Finance Companies" made an exhaustive study of the finance business. The report of this joint committee (Exhibit 53

in the present record) is the basis for the legislature's adoption of Section 218.01. There was extensive discussion of dealer participation, and its abuse, the "pack", noted above. There is nothing in that report either to indicate that the limitations upon some finance companies and not others would remedy any abuse or to indicate the slightest basis, rational or irrational, for any differentiation, as between finance companies. The evil which the committee saw in excessive dealer participation was not in *who* paid the dealer but rather in how much was paid. The following quotation from the report as to conditions prevailing in 1935, before the legislation, is illustrative (p. 35):

> "Keen competition then developed between *all finance companies, whether independent or nationals,* to secure the dealer's business. The result has been to enhance the evils of reserves, rebates and packs. Today, when a dealer makes arrangements to finance his paper, his first question is, 'How much do I get and when do I get it?'
>
> "In regard to reserves, rebates and packs, the Committee is of the opinion that the business has developed along this line where the proverbial slogan is in order: 'Everyone for himself and the Devil take the hindmost.' Inasmuch as the reserve, rebate, or pack must necessarily be paid by the consumer it logically follows that he is the 'hindmost'.
>
> "The Committee finds that quite often rebates are concealed in reserve allowances, and while excessive dealer's reserve is set up and paid as such, a portion of the said amount is in reality a rebate." (Our emphasis)[8]

---

[8] The Committee's ultimate conclusions may be gleaned from the following quotation in the same report, pp. 58-60:

> "• • • Charges and rates should be as low as possible to the consumer, but high enough to attract capital into the field. If abuses are eliminated, and consumer charges and interest rates are not concealed, competition between finance agencies will reduce charges and

The statute enacted pursuant to this report likewise can be the basis for no differentiation between GMAC and any other finance company. It regulates dealer participation as such—not how, when or by whom that participation is paid.

Finally, the Commissioner's Rule II contains no such classification or reason therefor. Rule II as written made it unlawful for *any* finance company to pay *or for a dealer to receive* dealer participation in excess of the amounts specified in the Rule.

The investigating committee, the legislature and the appellee have always recognized that the evil of excessive dealer participation is this and this only: that *dealers* charge retail purchasers exorbitant, hidden amounts which do not represent fair financing charges; and that these excessive amounts are repaid by finance companies to the *dealers* in order to obtain the dealers' time paper. Which finance company pays the dealer and how the moneys are paid is irrelevant. It is the dealer, not the finance company, who was the primary object of this regulation.[4]

---

rates to the lowest possible point consistent with good business. • • •

"When carrying charges are clarified and insurance costs are separated therefrom, uniform systems of bookkeeping and reporting developed, oppressive collection methods done away with, and a basis of fact developed upon which a fair and equitable charge might be predicated, rate fixing might be practicable. Until this is done, it is the opinion of the Committee that open and competitive methods in this branch of financing will eliminate the necessity of rate fixing. • • •

"Therefore the Committee feels that the keen competition between automobile finance companies who are interested in time payment purchases will, when the public has full knowledge of all charges including reserves, rebates and 'packs', reduce installment credit rates and charges to the lowest possible point. • • •"

[4] It is ironic, to say the least, that GMAC, which, as the record shows, was in the vanguard in its refusal to cooperate with dealers who desired to resort to the "pack", should now be singled out for discrimination.

Yet the appellee's Rule is invalidated, in effect, by the Supreme Court of Wisconsin as it is applied to finance companies other than GMAC (or other finance companies with closely affiliated insurance companies). A dealer may now, by dealing with a finance company and an independent insurance company, obtain the full dealer participation allowed by the Rule without being deprived of the right to receive insurance commissions. It is obvious that such a choice for the dealer makes the classification sanctioned by the Wisconsin Court a meaningless one, entirely inconsistent with the purpose of the regulation of dealer participation.

Even if GMAC were larger than its competitors in Wisconsin, and even if there were an attempt on GMAC's part to monopolize the industry—facts which do not appear of record and are not issues in this proceeding—this would be a case in which "size is not an index to an admitted evil" and hence "the law cannot discriminate between the great and small". Mr. Justice Holmes, for the Court, in *Engel* v. *O'Malley*, 219 U.S. 128, 138, 55 L. ed. 128, 136 (1911). See *Cotting* v. *Godard*, 183 U.S. 79, 46 L. ed. 92 (1901). Further, the close relationship between GMAC, MIC and GM cannot justify the discrimination against GMAC. There is nothing necessarily sinister in "interlocking directorates", or stock ownership of one corporation by another. General Motors is hardly in the position of those public utility holding companies who, because of their deception of the public as to the beneficial ownership of local utilities and consequent ability to over-reach the investor and his local utility, were subjected to regulation by the Public Utility Holding Company Act of 1935, 15 U.S.C. § 79. See particularly § 79a (b). In the case of GMAC, there has never been any attempt to conceal its corporate ties. The very names of the three corporations suggest their relationship and the record is studded with instances of the advertisement of the "GM

Family". What is more important, the relationship of the corporations in the "GM Family" can have no rational bearing upon any regulation of dealer participation, as demonstrated above.

In short, there is neither a practical nor logical reason for Wisconsin's limiting its regulation of insurance commissions as dealer participation to finance companies closely affiliated with insurance companies nor is there any relation between regulation of dealer participation and GMAC's ownership of MIC.

Conclusion

This Court has jurisdiction on appeal. In view of the growing regulation in this field, the issue is of public importance. Statutes have been passed at least in Ohio, Indiana, Michigan, Massachusetts and Maryland, as well as Wisconsin. Substantial questions regarding the propriety of Wisconsin's classification of finance companies in relation to its regulation of dealer participation are presented under the equal protection clause of the Fourteenth Amendment. This Court should note jurisdiction.

Respectfully submitted,

ADOLPH I. MANDELKER,
Attorney for Appellant.

By: JACKSON M. BRUCE,
Of Counsel.

JACKSON M. BRUCE,
ANTHONY J. RUSSO,
Of Counsel.

Dated: April 27, 1951.

APPENDIX "A"

OPINION OF THE SUPREME COURT OF WISCONSIN RENDERED DECEMBER 5, 1950

STATE OF WISCONSIN: IN SUPREME COURT

August Term, 1950

No. 16

GENERAL MOTORS ACCEPTANCE CORPORATION, *Appellant*,

v.

COMMISSIONER OF BANKS, Formerly Designated as Banking Commission, *Respondent*

Appeal from a judgment of the circuit court for Dane County: Herman W. Sachtjen, Circuit Judge. *Affirmed.*

Proceeding by petition to the circuit court for Dane county under sec. 227.05 (1) Stats. for a determination by declaratory judgment that Rule II A of the Banking Commission (now Commissioner of Banks) is invalid. Judgment, which was entered March 1, 1950, determined that the rule is in all respects valid and constitutional; that it is not in excess of the statutory authority or jurisdiction of the Banking Commission or its successor, the Commissioner of Banks; and that said rule is not arbitrary or capricious or without basis in fact, all contrary to the allegations in said petition. Petitioner appeals from the whole of said judgment. The material facts will be stated in the opinion.

BROADFOOT, J. The findings of fact made by the trial court are a brief statement of the facts herein, and are as follows:

"1. That at all times material petitioner General Motors Acceptance Corporation, hereinafter referred to as GMAC was and is a foreign corporation duly licensed to do business in the state of Wisconsin with its offices at 606 W. Wisconsin Avenue, Milwaukee, Wisconsin. That at all times mentioned herein all the capital stock of GMAC with ex-

ception of directors' qualifying shares, was and is owned by General Motors Corporation.

"2. That G. M. Matthews, who resides in the city of Madison, Wisconsin, is the duly appointed, qualified and acting Commissioner of Banks of the state of Wisconsin.

"3. That continuously since 1936, GMAC has been and now is licensed in Wisconsin as a sales finance company and is engaged in the business of purchasing conditional sales contracts from automobile dealers holding franchises with General Motors Corporation.

"4. That GMAC purchases the conditional sales contract, signed by said automobile dealer, from the General Motors dealer, at a discount. In arriving at the total price to a retail buyer under such installment contract, the dealer adds to the cash sale price a finance charge and also a charge for the cost of insurance, if there be any. For that purpose the dealer consults a rate chart furnished by GMAC and such chart is on file with the Banking Commission. The finance charge has been designated and is known as the 'time price differential.'

"5. That for the past 25 years there has been active competition among finance companies for the privilege of purchasing both the contracts from General Motors dealers as well as other dealers who sell installment contracts.

"6. That originally GMAC purchased said conditional sales contracts from said General Motors dealers with recourse and such dealers were required to make good to GMAC for any losses sustained in the event the automobile buyer failed to make payments called for by the contract.

"7. That during this time other finance companies were established and competed for the privilege of buying conditional sales contracts both from General Motors dealers and other automobile dealers but upon a non-recourse basis, and such companies were known as 'non-recourse companies.'

"8. That to meet this competition the recourse companies, of which GMAC was one, established a practice of setting aside a part of the time price differential which at stated periods were remitted back to the automobile dealer to reimburse him for any losses he may have sustained by reason

of their dealing on a recourse basis; that such part of the time price differential set aside for the dealer was known as the reserve, or 'dealer's reserve' or 'dealer's participation.'

"9. That for many years prior to 1935 the amount so remitted covered more than the losses incurred by such automobile dealers and became a source of profit to them. Shrewd automobile dealers began to shop around and place their business with the finance company that gave them the largest reserve out of a given installment contract. Because of the keen competition between finance companies, certain abuses grew or developed in trying to obtain these contracts from dealers. These abuses were known as 'packs' and 'rebates' and became an excessive and a hidden expense to the automobile buyer.

"10. That the 1933 legislature, by resolution, authorized an investigation of finance companies and pursuant to such resolution the Banking Commission and an Interim Advisory Legislative Committee conducted such an investigation; that they submitted a report to the legislature of 1935 wherein they found that in many cases there were evils of excessive reserves which in reality were 'packs' and 'rebates.'

"11. That as a result of said report, the 1935 legislature enacted Section 218.01; that one of the primary purposes of such enactment was to regulate these finance companies so as to protect the automobile buyer from the evils of 'packs', 'rebates,' and 'excessive reserves.'

"12. That by later enactments to Section 218.01 there was delegated to the Banking Commission the authority to make rules and regulations which would promote the interests of retail buyers of motor vehicles and also gave to the Banking Commissioner the power to define unfair practices in the industry.

"13. That pursuant to such statutory enactment the Banking Commissioner promulgated rules and regulations, one of which purports to regulate 'dealer's reserve' or 'dealer's participation,' and is the rule that is the subject of this litigation. The provisions of the rule that are under attack read as follows:

"'Rule II. Dealer Participation.

"'A. "Dealer Participation" is defined as that portion of the charge contained in the rate charts on file with the Banking Department which is retained by or remitted or credited to the dealer by the finance company and shall also include any benefit from or part of any amount collected from any retail purchaser as a finance or insurance charge, which shall come to or be retained by a motor vehicle dealer on the sale or transfer, by such dealer, or a retail instalment contract of a motor vehicle.

• • •

"'D. Unreasonable Dealer Participation.

"'1. Any unreasonable or unconscionable dealer participation is hereby declared to be an unfair trade practice. Furthermore, any dealer participation in excess of the following is declared an unfair trade practice and unconscionable.

"'a. Two per cent per annum for a period not to exceed eighteen months of the unpaid balance on any retail instalment contract of a new motor vehicle. A minimum participation of $8.00 may be given and a maximum participation not to exceed $20.00.

"'b. Three per cent per annum for a period not to exceed eighteen months of the unpaid balance of any retail instalment contract of a used motor vehicle, the model of which is not over two years old. A minimum participation of $8.00 may be given, and a maximum participation of not to exceed $20.00.

"'c. Five per cent per annum for a period not to exceed eighteen months of the unpaid balance of any retail instalment contract of a used motor vehicle, the model of which is over two years old. A minimum participation of $8.00 may be given, and a maximum participation of not to exceed $20.00.'

"14. That since August 1, 1925 GMAC has had many finance plans in effect and since that time has required that insurance in some form be provided all at the expense of the automobile buyer; that through its advertising, both to

its dealers and to the public, it has always treated and considered insurance as an integral part of the cost of financing.

"15. That since August 1, 1925 up to the middle of 1945 the insurance provided for by the GMAC plan was written by General Exchange Insurance Corporation, hereinafter referred to as GEIC. Originally the majority of stock of GEIC was owned by GMAC but since the end of 1935 GEIC has become and is a wholly owned subsidiary of General Motors Corporation. The insurance written by GEIC was at 25 per cent less than manual rates and written as a part of the GMAC installment plan; this saving was passed on to the automobile buyer.

"16. That during the summer of 1941 Motors Insurance Corporation, hereinafter referred to as MIC, was incorporated. It is a wholly owned subsidiary of GMAC and is engaged in the writing of insurance required by GMAC on all vehicles sold on its time sales plan. MIC is licensed in this state to transact insurance business and the rates charged by it are standard or manual rates, the same as charged by stock companies for like coverages. MIC appoints as its agents the automobile dealers who hold franchises from General Motors Corporation and it pays such agent a commission of 25% of the premium so charged. GMAC on all insurance so written collects the insurance premiums from the retail buyers and remits the same periodically to MIC. MIC remits the insurance commissions to the dealer as allowed by Rule II.

"17. That MIC was incorporated in 1941 after the promulgation of Rule II; immediately a dispute arose between the Banking Commission and GMAC as to whether the insurance commissions paid by MIC to the dealers should be included as part of the 'dealer participation.' The Banking Commission determined that such insurance commissions should be included as part of "dealer participation' and since December 1941 GMAC has reluctantly complied with the rule.

"18. That GMAC suffers no monetary injury from Rule II as presently applied and has no legally protectible interest involved in the present controversy."

The appellant takes no issue with the findings of fact but does challenge the conclusions of law. In its brief the appellant states the basic issue as follows:

"In view of the situation, the basic issue in this case narrows down to the question whether insurance commissions received by the dealer from an insurance company, under the circumstances involved in this proceeding, constitute dealer participation within the proper meaning and scope of that term. GMAC contends that they do not, and that the defendant is not empowered to enlarge or extend the concept and meaning of dealer participation by subjecting the insurance commissions to the defendant's regulatory power over dealer participation. If GMAC's position on that basic question is correct, it follows that the defendant, by construing and applying the definition of dealer participation so as to bring the insurance commissions under its regulation of dealer participation, has unlawfully asserted regulatory power over something which is not dealer participation."

In its memorandum opinion the trial court summarized the argument of the appellant as follows:

"When the dealer is authorized by the buyer to procure the insurance from MIC, and he sells the installment contract to the petitioner, he acts in two capacities; namely, (1) as a seller of the installment contract to the petitioner, and (2) as a licensed insurance agent of MIC. The only benefit that accrues and is received by the dealer from the petitioner is the reserve with which he is credited and which he receives in connection with each installment sales contract. Petitioner has no objection to the defendant fixing minimum and maximum amounts for this participation. The insurance commission which the dealer receives, while a benefit to him, is received in a different capacity and for a different service performed by him than the seller of a sales contract. He receives the insurance from MIC, a separate corporate entity, as its licensed agent for procuring the insurance. The commission paid by MIC to such dealer is the same compensation for the same service and function for which some other insurance company would compensate its agent

if the retail buyer had purchased the insurance elsewhere. It is no benefit received from petitioner as a licensed sales finance company. The scope of dealer's participation must be measured by whatever benefit the dealer received from the petitioner."

The appellant made other arguments in detail to support its position. Each of its arguments is based upon the premise that appellant and its wholly-owned subsidiary, Motors Insurance Corporation, are separate entities. If that premise is correct, its arguments have weight and are convincing. If the premise is wrong, then the opposite is true.

The record reveals many instances of the close association of GMC, GMAC, and MIC: (1) MIC is a wholly-owned subsidiary of GMAC; (2) MIC does not write complete automobile coverage but only writes insurance against fire, theft and accidental physical damage to the car (including deductible collision). It writes only the insurance required by GMAC on vehicles sold on its time sales plan; (3) no separate application for insurance is made to MIC. To write the insurance MIC obtains from GMAC its dealer's work sheet which contains the necessary information; (4) GMAC advertises the insurance as part of a "one package plan." It advertises to dealers as follows:

"The value of the plan to the dealer is apparent from the following comparison of the profit potential of two sales:

"GMAC Plan	Bank Financing
"Car Sale	Car Sale
"Insurance Commissions	
"Dealer Reserve	
"Shop Volume from Insurance Losses	
"Insurance Renewals	
"Close customer relation	
"a) Service sales	
"b) Repeat car sales"	

It advertises to the public as follows:

"Here's why we use the
"General Motors Instalment Plan

"Operated by G.M.A.C.
"Because you get——

"1. Low cost
"2. Broad insurance protection
"3. Convenient 'One Package' transaction
"4. Flexibility—liberal treatment
"5. Local plus nation-wide facilities
"6. Budget plans for accessories and repairs
"7. Friendly, courteous service

"A complete and exclusive service for General Motors Customers."

(5) In the various documents used in the GMAC plan the insurance charges are referred to as "territorial charges." In one rate chart, Exhibit No. 42, the dealer is instructed to "consult GMAC branch for territory charge in all transactions involving tractors, trailers, semi-trailers and cars equipped to haul trailers." On another page of the same exhibit, dealers are referred to the GMAC branch for territory charge on used cars, rather than to MIC.

There are other factual situations reflected in the record which indicate the GMAC and MIC are separate corporations in name only. In legal language each corporation is considered as a separate entity. Separate corporations with common stock ownership, however, should not be treated as separate entities if reasonable regulation is hampered thereby.

> "Where the corporate form of organization is adopted or a corporate entity is asserted in an endeavor to evade a statute or to modify its intent, courts will disregard the corporation or its entity and look at the substance and reality of the matter. This has been applied to violations of laws against 'trusts' and combinations in restraint of trade and commerce, laws regulating public utilities, laws against rebating and overcharges, tax laws, and a workmen's compensation law. The courts will, conversely, refuse to regard corporations as the same in favor of one which seeks

thereby to evade law or legal obligations." 1 Fletcher Cyclopedia, Corporations, (Perm. ed.) p. 170, sec. 45.

See also *Milwaukee Toy Company* v. *Industrial Commission*, 203 Wis. 493, 234 N.W. 748; *Minahan* v. *Timm*, 210 Wis. 689, 247 N.W. 321; *Palmolive Co.* v. *Conway*, 43 F. (2d) 226; *United States* v. *Milwaukee Refrigerator Transit Co.*, 142 F. 247.

The separate corporate entity of MIC is asserted for the purpose of paying car dealers added "dealer participation" indirectly under the guise of insurance commissions. In view of the above authorities a piercing of the corporate veil shows that in substance GMAC and MIC are only separate names for the same persons and that the respondent is correct in his position.

By the Court.—Judgment affirmed.

APPENDIX "B"

OPINION OF THE SUPREME COURT OF WISCONSIN.

Rendered February 6, 1951

No. 16

August Term, 1950

STATE OF WISCONSIN: IN SUPREME COURT.

General Motors Acceptance Corporation, *Appellant*,

v.

Commissioner of Banks, formerly designated as Banking Commission, *Respondent*.

Broadfoot, J. (on motion for re-hearing). Upon the motion for rehearing, the petitioner, General Motors Acceptance Corporation, states that, in its decision herein, the court made no reference to a constitutional question raised

upon the appeal. The petitioner contended then, and does now upon this motion, that the ruling of the Commissioner of Banks and the decision of this court result in a denial to petitioner of the equal protection of the laws and a deprivation of its property without due process of law, each of which is guaranteed by the Fourteenth Amendment to the Constitution of the United States. Although it was specifically referred to in the opinion, the court considered this contention and deemed it to be without merit.

By the Court.—Motion for rehearing denied with $25.00 costs.

APPENDIX "C"

Rule II of the Commissioner of Banks of Wisconsin

Rule II Dealer Participation

A. "Dealer Participation" is defined as that portion of the charge contained in the rate charts on file with the Commission which is retained by or remitted or credited to the dealer by the finance company and shall also include any benefit from or part of any amount collected from any retail purchaser as a finance or insurance charge, which shall come to or be retained by a motor vehicle dealer on the sale or transfer, by such dealer, of a retail instalment contract of a motor vehicle.

B. No licensee shall create or be a party to creating, or accept, a dealer participation predicated upon any time sales transaction for the unpaid purchase price of an automobile which shall be unconscionable.

C. No finance company shall give or enter into any arrangement or transaction, or have any understanding with an automobile dealer to give a dealer participation which is unconscionable. A finance company may accept irregular or special deals to fit the peculiar needs of a purchaser, but no finance company in such irregular or special deals shall permit a larger dealer participation than is usual and customary in deals conforming to its filed rate charts.

D. Unreasonable Dealer Participation.

1. Any unreasonable or unconscionable dealer participation is hereby declared to be an unfair trade practice. Furthermore, any dealer participation in excess of the following is declared an unfair trade practice and unconscionable:

a. Two per cent per annum for a period not to exceed eighteen months of the unpaid balance on any retail instalment contract of a new motor vehicle. A minimum participation of $8.00 may be given and a maximum participation not to exceed $20.00.

b. Three per cent per annum for a period not to exceed eighteen months of the unpaid balance on any retail instalment contract of a used motor vehicle, the model of which is not over two years old. A minimum participation of $8.00 may be given, and a maximum participation of not to exceed $20.00.

c. Five per cent per annum for a period not to exceed eighteen months of the unpaid balance on any retail instalment contract of a used motor vehicle, the model of which is over two years old. A minimum participation of $8.00 may be given, and a maximum participation of not to exceed $20.00. (A motor vehicle shall be considered over two years old when the year model of that car is older than the current year model and the two next preceding year models. For example: After the 1942 models were introduced, 1939 year models and all models previous thereto became more than two years old.)

The foregoing dealer participation is allowed by the Commission as a sufficient and adequate sum to compensate reasonably prudent motor vehicle dealers for losses incurred by them on motor vehicles sold on the instalment plan until such a time as a survey can be made for final determination on this phase of the industry.

2. Whenever any sales finance company shall, directly or indirectly, or by any subterfuge, grant, allow, or credit, or agree to grant, allow or credit to any person or persons, except bona fide employes of the sales finance company, any participation in any finance charge which shall total in

excess of the percentages set forth above, it shall within five days after allowing, granting, or crediting such participation, mail to the purchaser of the financed motor vehicle, the notification set forth in subsection D 4 of Rule II, specifying therein the names of all persons who received participation and the amount of participation paid or credited each, and specifying further whether or not, to the best knowledge, information and belief of the finance company, such participation or part thereof inured directly or indirectly to the benefit of the dealer or the salesman who sold the financed car.

3. Rule 2 above shall apply to any sales finance company which shall rediscount instalment sales contracts for a motor vehicle dealer who is licensed as a sales finance company, or for a sales finance company, 25% or more of whose stock is owned in the aggregate by such dealer or his stockholders or his or their families.

4. Notice to the purchaser by the finance company.

IMPORTANT NOTICE

By order of the Banking Commission of Wisconsin you are hereby notified that so large a part of the finance charge you are paying on the ..... automobile you purchased on or about ..... from ..... has been, or will be paid over by the finance company to the persons shown below, that the Banking Commission of Wisconsin considers it an unfair trade practice; and, therefore, requires your finance company to send you this notice.

Your finance charge has been or will be divided as follows:

Apparently kept by your dealer	$.....
Apparently kept by	$.....
Apparently kept by	$.....
Manual insurance premium	$.....
Kept by the undersigned	$.....
Total charge	$.....

We are informed and believe that $..... of said charge will, directly or indirectly, inure to the benefit of

your dealer, and $..... to the salesman who sold you your car.

Dated ....., 19..

If you desire to communicate with the Banking Commission, address your communication to: Division of Consumer Credit, State Banking Department, Madison, Wisconsin.

....,

.....

This form must be approved by the Commission as to size and style of type and manner of make-up before being used.

5. Any sales finance company which shall pay any salaries or bonuses or make any gifts of money or merchandise to any motor vehicle dealer or motor vehicle salesman, directly or indirectly, or to any person or persons for them, other than usual and customary gifts on festive occasions, and any motor vehicle dealer or motor vehicle salesman who shall accept or receive any such salaries, bonuses, or gifts shall report such salaries, bonuses or gifts to the Banking Commission within five days after the same are made; and if the Commission, after a hearing, shall find that such gifts, salaries, or bonuses constitute a circumvention of the foregoing rule, it shall immediately suspend the license of the salesman, dealer and finance company involved, for a period of at least thirty days, and it shall enforce such other penalties as the facts shall warrant and the law permit.

6. Any motor vehicle dealer who shall directly or indirectly, or by any subterfuge, accept, take, or obtain, or agree so to accept, take, or obtain, in any manner or by any device either in cash or in credit or otherwise, any dealer participation which is unreasonable or unconscionable, or which exceeds the aforesaid percentage limitations, shall mail to the purchaser under the instalment sales contract in question the notice set forth in sub-section D 7 hereof, within five days after accepting, taking, or obtaining such participation, or agreeing so to do.

7. Notice to the purchaser by the motor vehicle dealer.

IMPORTANT NOTICE

To ....., by order of the Banking Commission of Wisconsin you are hereby notified that the undersigned who sold you a ..... car under instalment sales contract on the .... day of ....., 19.., has, or will, receive from the ..... finance company so large a part of the carrying charge provided for in the instalment contract, that the Banking Commission of Wisconsin consider it an unfair trade practice and, therefore, require the undersigned to send you this notice.

Your finance charge has been or will be divided as follows:

Retained by your undersigned dealer	$.....
Retained by the finance company and for insurance	$.....
Total finance charge	$.....

If you desire to communicate with the Banking Commission, address your communication to: Division of Consumer Credit, State Banking Department, Madison, Wisconsin.

Dated ....., 19....

.....

.....

This form must be approved by the Commission as to size and style of type and manner of make-up, before being used.

8. Whenever a sales finance company or motor vehicle dealer is required by any of the foregoing rules to mail either the notice provided for in D4 or D7, such finance company or dealer shall at the same time mail a copy of said notice to the Banking Commission of Wisconsin, with an affidavit by one of its officers that such notice is a true and correct copy of the notice mailed the purchaser, and also stating the date of such mailing.

9. No sales finance company shall, directly or indirectly, give or contract to give, to any motor vehicle salesman, and no motor vehicle salesman shall, directly or indirectly, take or obtain, or agree to take or obtain, any sum of money or anything of value, either directly or indirectly, or by any

subterfuge, as a consideration, inducement, or reward, for the receipt of any instalment contract or contracts by such finance company through the influence or effort or pretended influence or effort, of such salesman. The violation of this rule is declared to be an unfair trade practice, and any finance company or salesman who shall be guilty of such unfair trade practice shall immediately make full and complete disclosure of such unfair trade practice by mailing to the purchaser of the car under the instalment contract on which was the basis of the reward, the notice set forth in D10 within the five days after such reward shall be paid or agreed to be paid, and shall at the same time mail a copy of said notice to the Banking Commission of Wisconsin with an affidavit that such notice had been mailed to the purchaser.

10. Notice to the purchaser by the finance company.

IMPORTANT NOTICE

To ....., by order of the Banking Commission of Wisconsin you are hereby notified that when the ..... automobile which you purchased from ....., automobile company, was financed by the ....., finance company, the said finance company paid or agreed to pay ....., the salesman who sold said car, a reward of $..... This sum is in addition to the compensation paid said salesman by the dealer above named. Under the rules and regulations of the Wisconsin State Banking Department this is an unfair trade practice and the salesman receiving such reward and the finance company granting such reward are required to notify you thereof.

If you desire to communicate with the Banking Commission, address your communication to: Division of Consumer Credit, State Banking Department, Madison, Wisconsin.

Dated ....., 19....

.....

.....

This form must be approved by the Commission as to size and style of type and manner of make-up before being used.

E. In the event of prepayment of an instalment contract, on which a rebate for prepayment is allowed by the finance company, it shall be defined as an unfair trade practice for the retail seller to fail to refund to the finance company a proportion of the finance charge which was paid to him or credited to his account as dealer participation, or for the finance company to fail to require the retail seller to refund to the finance company the unearned portion of the dealer participation, except if said unearned portion is less than $1.00; the proportion to be determined by the use of the sum of the digits method based on the number of monthly payments for which the contract was originally written and the number of months the contract was actually in force.

FILED
MAY 21 1951
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 746

GENERAL MOTORS ACCEPTANCE CORPORATION,
Appellant,

vs.

COMMISSIONER OF BANKS OF THE STATE OF WISCONSIN

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

STATEMENT OPPOSING JURISDICTION

VERNON W. THOMSON,
Attorney General;
ROY G. TULANE,
Assistant Attorney General,
Counsel for Appellee.

WILLIAM E. TORKELSON,
Of Counsel.

INDEX

Subject Index

	Page
Statement opposing jurisdiction	1
Nature of the case	2
Statement of facts	2
Jurisdiction	3
I. Appellant has failed to plead and prove any facts to substantiate its claim of discrimination	3
II. The Wisconsin Courts have found as a fact that the so-called insurance commissions were nothing but dealer participation	8
III. GMAC suffers no injury as the result of the application of Rule II and therefore has no standing in Court	10
IV. GMAC has failed to exhaust its administrative remedy	12
Conclusion	13

Table of Cases Cited

Aetna Life Insurance Co. v. *Haworth*, 300 U. S. 227, 57 S. Ct. 461, 81 L. ed. 617, 108 A.L.R. 1000	11
Alabama State Federation of Labor v. *McAdory*, 325 U. S. 450, 65 S. Ct. 1384, 89 L. ed. 1725	11
Anderson v. *Abbott*, 321 U. S. 349, 64 S. Ct. 531, 88 L. ed. 793	5
Ashbury Hospital v. *Cass County*, 72 N. D. 359, 7 N. W. (2d) 435	10
California State Auto Assn. Inter-Insurance Bureau v. *Maloney*, 71 S. Ct. 601	11
Coffman v. *Breeze Corporation*, 323 U. S. 316, 65 S. Ct. 298, 89 L. ed. 264	11
Corstvet v. *Bank of Deerfield*, 220 Wis. 209, 263 N. W. 687	12

Page

Daniel v. *Family Security Life Ins. Co.*, 336 U. S. 220, 69 S. Ct. 550 5

General Motors Acceptance Corp. v. *Commissioner of Banks of Wisconsin*, 258 Wis. 56, 45 N. W. (2d) 83, 258 Wis. 64a, 46 N. W. (2d) 328 ..... 1, 2

Henneford v. *Silas Mason Co.*, 300 U. S. 577 10

James Conroy Family Company v. *Milwaukee*, 246 Wis. 258, 16 N. W. (2d) 814 12

Macauley v. *Waterman Steamship Co.*, 327 U. S. 540, 66 S. Ct. 712, 70 L. ed. 839 13

Mason v. *Missouri*, 179 U. S. 328, 21 S. Ct. 125, 45 L. ed. 214 5

Myers v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 58 S. Ct. 459, 82 L. ed. 638 13

State ex rel. Attorney General v. *Fasekas*, 223 Wis. 356, 269 N. W. 700 12

State ex rel. Attorney General v. *Noyes*, 223 Wis. 378, 269 N. W. 710 12

Stockholders of the Peoples Banking Co. of Smithsburg, Maryland v. *Sterling*, 300 U. S. 175, 57 S. Ct. 386, 81 L. ed. 586 11

United Parcel Service v. *Public Service Commission*, 250 Wis. 603, 4 N. W. (2d) 138 3

STATUTES CITED

American Jurisprudence, Volume 15, para. 5 "Declaratory Judgment" 11

Laws of Wisconsin of 1947, Ch. 411 2

Rule II of the Banking Commission of Wisconsin 2, 4, 5

Wisconsin Statutes, Section 218.01, Subsection 1 "(1)" 7

Wisconsin Statutes, Section 220.037 12

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 746

GENERAL MOTORS ACCEPTANCE CORPORATION,
Appellant,

vs.

COMMISSIONER OF BANKS OF THE STATE OF WISCONSIN,
Respondent

STATEMENT OPPOSING JURISDICTION

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

Pursuant to paragraph 3 of Rule 12 of the Rules of the Supreme Court of the United States, the Attorney General of the State of Wisconsin files this statement opposing jurisdiction.

Nature of the Case

This is an appeal by General Motors Acceptance Corporation from a judgment of the Supreme Court of the State of Wisconsin entered on December 5, 1950 reported in 258 Wis. 56, 45 N. W. 2d 83 (195) and in respect to which

a rehearing was denied on February 6, 1951 as reported in 258 Wis. 64a, 46 N. W. 2d 328 (1951).

This judgment of the Supreme Court of the State of Wisconsin affirmed a judgment of the Circuit Court for Dane County, State of Wisconsin, which found and determined that Rule IIA of the Banking Commission of the State of Wisconsin (continued in effect as a rule of the Commissioner of Banks by ch. 411, Laws of Wisconsin, 1947) is in all respects valid and constitutional, within the statutory authority of the issuing agency and its successor, that said Rule IIA is not arbitrary or capricious or without basis and fact, and that said Rule IIA was properly construed and applied to include in "dealer participation" the insurance commissions received by a General Motors dealer who is also an agent of Motors Insurance Corporation.

Statement of Facts

The findings of fact of the trial court quoted with approval by the Supreme Court of Wisconsin in its opinion, Appendix A to appellant's statement, together with the references to the record in that opinion, present an excellent summary of all material facts necessary for an understanding of the issues presented herein.

We direct particular attention to finding 17, which reads: "that GMAC suffers no monetary injury from Rule II as presently applied and has no legally protectible interest involved in the present controversy"; to finding No. 15 which states that for some 20 years commencing August 1, 1925 insurance under the GMAC plan was furnished through the General Exchange Insurance Corporation without any charge for insurance commission; and to finding No. 17 which states that since December, 1941 GMAC has reluctantly complied with Rule II.

Further, in the memorandum decision of the trial court which under Wisconsin law may be considered the same as formal findings of fact, *United Parcel Service* v. *Public Service Commission* (1942), 240 Wis. 603, 607-8, 4 N. W. 2d 138, the court stated, "* * * the dealer agent does nothing to warrant additional compensation. * * *", and the record shows that the services in the so-called sale of an insurance policy for which GMAC proposes to pay its dealer some $10 to $20 or more consisted merely of making two check marks in the right places on the conditional sales contract.

Jurisdiction

Jurisdiction is opposed on the ground that no substantial federal question is involved.

I. Appellant Has Failed to Plead and Prove Any Facts to Substantiate Its Claim of Discrimination

Appellant bases its claim of jurisdiction on the ground that it has been denied the equal protection of the laws in that Rule II as construed by the Supreme Court of the State of Wisconsin discriminates unfairly between auto finance companies like GMAC, which have a wholly owned insurance company such as MIC, and other finance companies which are not closely affiliated with insurance companies.

Appellant's contention in this form was raised for the first time on motion for rehearing, in spite of the fact that respondent both in trial court and in the Supreme Court of the State of Wisconsin had strenuously urged the identity of GMAC and MIC as one of the principal grounds of the validity of its rule.

While we recognize the rule that a federal question may be raised for the first time on motion for rehearing in state court, we respectfully point out to the Court that an

issue not adverted to until that time will in most cases have no sufficient record to sustain it.

There is thus nothing in the record in this case to support Appellant's argument that Appellant is singled out as the sole object of Rule II of the Commissioner of Banks limiting dealer participation. There is nothing to show how the rule applies to or is enforced against others, whether dealers or finance companies, whether affiliated with insurers or independent of them.

The Wisconsin Supreme Court affirmed the judgment of the Circuit Court of Dane County and that judgment, as recited in the opening paragraph of the Wisconsin Supreme Court opinion, determined that the rule is in all respects valid and constitutional; that it is not in excess of the statutory authority or jurisdiction of the Banking Commission or its successor, the Commissioner of Banks; and that said rule is not arbitrary or capricious or without basis in fact, all contrary to the allegations of the petition. No application of the rule to any other finance company or dealer, affiliated with or independent of an insurance company, was in any way inhibited.

The only contention of unconstitutionality presented prior to the motion for rehearing was, not a claim of discrimination, but an assertion merely that the rule exceeded the rule making authority conferred by the statute. The contention in the GMAC brief in the Wisconsin Supreme Court was: "Since the Rule is in excess of the statutory power of the administrative agency, it follows that the enforcement of the Rule is a denial to the petitioner of due process of law under the Fourteenth Amendment to the Constitution of the United States."

The objections first raised on the motion for rehearing and asserted by Appellant to support jurisdiction—that by identifying it with its wholly owned insurance subsidiary

it becomes the only finance company subject to Rule II A, thus making the Rule discriminatory—assume many things not in the record. They assume there are no other finance companies with wholly owned or affiliated insurance companies. The record is to the contrary (R. p. 211). They assume that the Commissioner of Banks will not enforce the rule against others according to its terms, regardless of affiliation or independence of insurers. There is nothing in the record to suggest that application of the Rule will be limited.

Even if these new objections could be supported by reference to the record, which is not the case, the power of the State to ignore the interposition of the separate corporation MIC is unquestionable. *Anderson* v. *Abbott*, (1944), 321 U. S. 349, p. 363, 64 S. Ct. 531, p. 538, 88 L. Ed. 793. And, even if GMAC were alone affected by the Rule, that does not establish an unconstitutional classification. The statement of the Court in *Daniel* v. *Family Security Life Ins. Co.*, (1949) 336 U. S. 220, p. 225 n. 5, 69 S. Ct. 550, p. 553, may be applied as follows:

> "That respondent company [here Appellant GMAC] is the only concern now affected by the statute [Rule] does not, of course, mean a denial of equal protection. The statute [Rule] is drawn in general terms; the company's [GMAC's] success might well induce others to enter the business."

See also, *Mason* v. *Missouri*, 179 U. S. 328, 21 S. Ct. 125, 45 L. Ed. 214.

The rule is elementary that the party desiring to challenge the constitutionality of a statute must both plead and prove the facts necessary to overcome the presumption of constitutionality.

Appellant's entire argument up until its motion for rehearing consisted simply of the constant reiteration of the

theme that insurance commissions are not dealer participation.

At no time did it either plead or prove that there were no substantial differences of legal significance between corporations in the status of the GMAC-MIC combine and other auto finance companies which were in no way affiliated with an insurance company, and nowhere in its present statement in support of jurisdiction does it attempt to show that there is an identity of legal status between GMAC-MIC and other companies which appellant claims are not subject to regulation under its interpretation of the decision of the Supreme Court of Wisconsin.

There can be no dispute with the argument in appellant's statement (heading QUESTIONS ARE SUBSTANTIAL, para. 1) that there must be a rational basis for classification. But then, in para. 2, the only remaining argument in its statement, instead of pointing out where in its pleading and proof it has shown that it occupies a similar status to the finance companies which it contends are not regulated, appellant attempts to reexamine the effect and purpose of the Wisconsin Statute which is purely a question of internal law of the State of Wisconsin and which has been decided adversely to its contention by the Wisconsin courts.

Appellant's discussion of the purpose of the statute is misleading and utterly erroneous. Through three courts now it has been impossible to force GMAC to face up to the simple fact that a principal evil in the finance business resulted from the competition between finance companies to see which one could pay the biggest kickback to the dealer, however denominated, in order to get his business. It was this race between the finance companies to give larger and larger sums to the dealers to secure his business which increased the finance costs to the public and inspired the investigating committee to quote the slogan, Exhibit 53, p.

35, "Everyone for himself and the devil take the hindmost." It was the competition among the finance companies to outbid each other for the privilege of purchasing a dealer's paper which increased the finance charge which the consumer had to pay. The only logical way to prevent what in effect was an auction of the paper to the highest bidder was to place a limit upon the amount that could be paid to the dealer and that is what the State of Wisconsin did by its Rule and Statute.

The Wisconsin Legislature recognized that insurance of the finance vehicle is part of the financing. It expressly defined for its regulatory law, §218.01 *Wis. Stats., Subsection* (1) "(i) 'Finance charge' means that part of the total price in the retail instalment contract of sale in excess of the cash price, and includes, unless otherwise specified, the insurance premium, if any." *Rule II A* of the Commissioner of Banks regulating "dealer participation" thus properly included in that concept "any benefit from or part of any amount collected from any retail purchaser as a finance or *insurance* charge, which shall come to or be retained by a motor vehicle dealer" * * *. (Emphasis supplied.)

This is the Rule which was affirmed, and it is not limited in application to GMAC. The Wisconsin Supreme Court, however, found GMAC's subterfuge of creating its wholly owned insurance subsidiary an easy basis for rejection of its challenge of the Rule. The fact that the Wisconsin Supreme Court stressed that and found it sufficient for rejection of GMAC's challenge does not detract from the affirmance of the Circuit Court judgment which sustained the Rule in all respects and all applications within its scope.

The force of the Rule and Statute would be entirely destroyed if any finance company could invent some device whereby it was able to funnel more money into the dealer's pockets in return for his paper than the maximum allowed

by the Rule, and that is exactly what GMAC would be able to do through the device of its wholly owned insurance subsidiary MIC.

II. The Wisconsin Courts Have Found as a Fact That the So-called Insurance Commissions Were Nothing But Dealer Participation.

The Supreme Court of the State of Wisconsin after approving in toto the trial court's formal findings stated in its opinion, "The separate corporate entity of MIC is asserted for the purpose of paying car dealers added 'dealer participation' indirectly under the guise of insurance commissions."

While we will concede that a state court cannot defeat federal jurisdiction by a finding of fact which is contrary to the evidence, appellant has nowhere attempted in its statement as to jurisdiction to show that the statement above quoted is contrary to the evidence and it could not do so for the record seems abundantly clear that the so-called insurance commissions were not in fact earned.

Finding 15 of the trial court, approved in its opinion by the Supreme Court of Wisconsin, shows that for 20 years insurance was furnished without charge for commission. The trial court stated in its memorandum opinion, in discussing this subject that, "the dealer agent does nothing to warrant additional compensation." Finally, the record appears to be conclusive that the only services rendered by the dealer agent which would entitle him to the so-called insurance commissions were to make two check marks in the right places on the conditional sales contract, Exhibit 1 in this case.

Since appellant has not seen fit to attack this finding it would appear that it must be taken as a verity. Hence

when appellant concedes, as it appears to do under the hearing in its statement, "Wisconsin Legislation," that the state has power to regulate dealer participation, it would appear that appellant has conceded itself entirely out of court.

The finding of fact that insurance commissions received by the dealer are part of dealer participation in the financing is also sustained by evidence in the record of GMAC's published statements in advertising and in its Dealer's Manual. The insurance is advertised to the public by GMAC as included in the low cost "One Package" transaction in the dealer's poster (Exh. 8) as follows:

> "Here's why we use the General Motors Instalment Plan *Operated by GMAC*. because you get—
>
> 1. Low cost
> 2. *Broad insurance protection*
> 3. Convenient *'One Package'* transaction
> 4. Flexibility—liberal treatment
> 5. Local plus nation-wide facilities
> 6. Budget plans for accessories and repairs
> 7. Friendly, courteous service
>
> A complete and exclusive service for General Motors Customers" (Emphasis supplied.)

The benefit to or participation by the dealer is described in GMAC's Dealer Manual (Exh. 15, p. 35; with emphasis supplied) as follows:

> "The value of the plan to the dealer is apparent from the following comparison of the profit potential of two sales:
>
> | GMAC Plan | Bank Financing |
> | --- | --- |
> | Car sale | Car sale |
> | *Insurance Commission* | |
> | *Dealer Reserve* | |
> | Shop Volume from Insurance Losses | |
> | Insurance Renewals | |

Close Customer Relation
(a) Service Sales
(b) Repeat Car Sales"

Insurance commissions and dealer reserve are thus admittedly dealer participation under the GMAC Plan.

III. GMAC Suffers No Injury as the Result of the Application of Rule II and Therefore Has No Standing in Court.

GMAC has never been able or willing to explain just how it suffers legal injury as the result of the application of Rule II. The record in the state court is barren of any such explanation as is the present statement on jurisdiction.

Finding No. 18 of the trial court reads:

> "That GMAC suffered no monetary injury from Rule IIa or Rule II as presently applied and has no legally, protectible interest involved in the present controversy."

It is obvious that the effect of the Rule is to compel the finance company to retain a larger portion of the finance charge than it would were the Rule not in effect. An automobile dealer who is thereby deprived of the opportunity of selling his installment paper in a free market would suffer a monetary injury and would have a right to be heard, but for reasons best known to themselves GMAC did not join a dealer as party plaintiff in this action.

One cannot champion the rights of anyone other than himself.

Ashbury Hospital v. *Cass County*, (1943), 72 N. D. 359, 7 N. W. 2d 438;

Hannaford v. *Silas Mason Co.*, (1937) 300 U. S. 577.

A person desiring to attack the constitutionality of a statute must show that he is injured by its application.

Coffman v. *Breeze Corporation*, (1945) 323 U. S. 316, 65 S. Ct. 298, 89 L. ed 264;

Alabama State Federation of Labor v. *McAdory*, (1945) 325 U. S. 450, 65 S. Ct. 1384, 89 L. ed 1725.

The burden is on the person attacking the law to show that he is injured.

Stockholders of The Peoples Banking Co. of Smithsburg, Maryland v. *Sterling*, (1937) 300 U. S. 175, 57 S. Ct. 386, 81 L. ed 586.

This action was commenced as an action for declaratory judgment. A statute which attempted to authorize a court to render declaratory judgment in moot cases would be unconstitutional.

Aetna Life Insurance Company v. *Haworth*, (1937) 300 U. S. 227, 57 S. Ct. 461, 81 L. ed 617, 108 A. L. R. 1000;

15 Am. Jur., *Declaratory Judgment*, para. 5.

Appellant's theory is that the Rule which it challenges impairs its ability to purchase conditional sales contracts from General Motors dealers. The correctness of any such claim is not conceded, but in any event the appellant sustains no injury in the constitutional sense as a result. In this connection this court on April 23, 1951 said in *California State Auto Ass'n. Inter-Insurance Bureau* v. *Maloney*,——U. S.——, 71 S. Ct. 601, 604 as follows:

"• • • Appellant's business may of course be less prosperous as a result of the regulation. That diminution in value, however, has never mounted to the dig-

nity of a taking in the constitutional sense. See Noble State Bank v. Haskell, supra, 219 U. S. at page 110, 31 S. Ct. at page 187; Block v. Hirsh, 256 U. S. 135, 155, 41 S. Ct. 458, 459, 65 L. Ed. 865."

IV. GMAC Has Failed to Exhaust Its Administrative Remedy

While the Supreme Court of the State of Wisconsin did not find it necessary to pass on this point because of the clear ruling that it was possible to make on the merits of the case, the law of Wisconsin is well established as it is in the federal courts that a party that has failed to exhaust his administrative remedy will not be heard in court.

Corstvet v. *Bank of Deerfield,* (1936) 220 Wis. 209, 263 N. W. 687;

State ex rel. Attorney General v. *Fasekas,* (1937) 223 Wis. 356, 269 N. W. 700;

James Conroy Family Company v. *Milwaukee,* (1944) 246 Wis. 258, 16 N. W. 2d 814;

State ex rel. Attorney General v. *Noyes,* (1937) 223 Wis. 378, 269 N. W. 710.

Prior to 1947 under the provisions of sec. 220.035, Wis. Stats., all orders or rules of the Banking Commission were subject to review by the Banking Review Board. The banking functions of the Commissioner of Banks continued to be subject to such review after 1947 and his acts under ch. 218, Wis. Stats., are subject to review under sec. 220.037, Wis. Stats., by the Consumer Credit Review Board.

Rule II was originally promulgated by the Banking Commission of Wisconsin back in 1938. The findings of the trial

court as set forth herein show that GMAC reluctantly complied with the Rule for many years after 1941.

GMAC conceded that it had made no attempt at any time to secure a review of Rule II by the Banking Review Board or by its successor, the Consumer Credit Review Board.

The United States Supreme Court adheres to the Rule that administrative remedies must be exhausted.

Myers v. *Bethlehem Shipbuilding Corporation*, (1938) 303 U. S. 41, 58 S. Ct. 459, 82 L. ed 638;

Macauley v. *Waterman Steamship Company*, (1946) 327 U. S. 540, 66 S. Ct. 712, 70 L. ed 839.

Conclusion

We respectfully submit that there is no substantial federal question involved in this case and that this appeal is utterly lacking in merit.

The principle on which the Supreme Court of the State of Wisconsin grounded its decision, that is, that the courts may disregard the assertion of a separate corporate entity whenever necessary to prevent evasion of the statutes of their states, besides being clearly a matter of internal state law, has been reiterated in literally hundreds of decisions both in state courts and in the Supreme Court of the United States. It does not appear that a further statement of this principle would serve any useful purpose.

Appellant in its statement on jurisdiction concedes that a state may lawfully regulate dealer participation.

Appellant has made no effective challenge to the finding of the state courts that the sums under dispute herein were in fact dealer participation and as set forth above we respectfully suggest that no such challenge could be made.

We respectfully submit that jurisdiction should not be noted.

Respectfully submitted,

VERNON W. THOMSON
Attorney General

ROY G. TULANE
Assistant Attorney General

Attorneys for Respondent

By: WILLIAM E. TORKELSON
Of Counsel

OF COUNSEL:
WILLIAM E. TORKELSON

Dated this 10th day of May, A. D. 1951.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 746

GENERAL MOTORS ACCEPTANCE CORPORATION,
Appellant,

vs.

COMMISSIONER OF BANKS OF THE STATE OF WISCONSIN,
Appellee.

Appeal From the Supreme Court of Wisconsin

APPELLANT'S REPLY TO STATEMENT OPPOSING JURISDICTION

Pursuant to paragraph 3 of Rule 12 and paragraph 3 of Rule 7 of the Rules of the Supreme Court of the United States, appellant submits herewith its reply to appellee's statement opposing jurisdiction. See Stern and Gressman, *Supreme Court Practice* (1950), page 240.

JURISDICTION: REPLY

Appellee states that he challenges the jurisdiction of this court "on the ground that no substantial federal question is involved." Much of his argument, however, is devoted

to various procedural objections. Only three of these assertions merit the following brief reply:

1. *Raising the Federal Question.* We believe we have adequately demonstrated in paragraph numbered 2 of the JURISDICTION section of our Statement that the federal question is properly before this Court. While appellant immediately raised the constitutional invalidity of the Rule in its initial petition and at all points throughout this litigation maintained that the corporate relationship of GMAC and MIC were irrelevant, it was not until the Wisconsin Supreme Court rendered its decision that the precise constitutional question here presented was evolved. At that time, upon the petition for rehearing, the Wisconsin Court specifically ruled on the precise constitutional question now before this Court.

2. *Exhaustion of Administrative Remedy.* In Section IV of his Statement Opposing Jurisdiction appellee states that "the law of Wisconsin is well established as it is in the federal courts that a party that has failed to exhaust his administrative remedy will not be heard in court." But in Wisconsin, as elsewhere, the doctrine of exhaustion of administrative remedies is based upon the theory that the legislature would have wanted that doctrine to be applied. As the Supreme Court of Wisconsin recognized by passing on the merits of this case, the Wisconsin legislature has stated in the most unmistakable terms that that doctrine shall not apply in Wisconsin in a declaratory proceeding brought under Chapter 227, Wisconsin Statutes, the chapter under which the present proceeding was brought. Section 227.05 (2) provides that "A declaratory judgment may be rendered whether or not the petitioner has first requested the agency to pass upon the validity of the rule in question."

3. *GMAC's Legal Injury.* In contending that GMAC has no standing to raise the constitutional question in this Court, appellee ignores the fact that he has threatened to revoke appellant's license to do business in Wisconsin. By his silence we must assume that appellee would agree that the threat of revocation legally injures GMAC. Appellant clearly has standing to raise his constitutional questions in this Court. See paragraph numbered 3 in the JURISDICTION section of appellant's Statement.

The trial court in Wisconsin overlooked this point, but the Supreme Court of Wisconsin clearly gave short shrift to the Commissioner's argument — it passed upon the merits of the case.[1]

THE QUESTIONS ARE SUBSTANTIAL: REPLY

1. Appellee suggests that his view that insurance commissions are part of dealer participation may still be invoked against finance companies not affiliated with insurance companies. The Commissioner's conclusion is not supported by the Supreme Court of Wisconsin. Appellee overlooks the fact that Wisconsin's highest court stated that were it not for its conclusion that GMAC and MIC should be treated as one, GMAC's "convincing" argument that insurance commissions are not dealer participation would have been upheld, — that is to say, the trial court's judgment would have been reversed.

Even the Commissioner does not argue that this rationale of decision, deliberately adopted by the Wisconsin

[1] Legal injury is essential in Wisconsin before a court will declare the rights of the parties under Chapter 227, Wisconsin Statutes, *supra*. § 227.05 (1) provides in part: "The court shall hear the petition and render a declaratory judgment thereon only when it appears from the petition and evidence presented in support thereof that the rule, or its threatened application, interferes with or impairs, or threatens to interfere with or impair, the legal rights and privileges of the petitioner."

court, justifies regulation of finance companies other than those deemed one and the same as insurance companies. Appellee refers constantly to the fact that *his Rule* and the *judgment* of the *trial* court upholding the Rule were affirmed by the Wisconsin Supreme Court, but it is obvious that a judgment means only as much as the issuing court says it means. See, for example, *International Union, U. A. W., A. F. of L. v. Wisconsin Employment Relations Board*, 336 U.S. 245, 93 L. ed. 651 (1949); *Hotel & Restaurant Employees' International Alliance v. Wisconsin Employment Relations Board*, 315 U.S. 437, 86 L. ed. 946 (1942); compare *Clark v. Williard*, 292 U.S. 112, 78 L. ed. 1160 (1934), with the earlier doctrine of finality in *Bruce v. Tobin*, 245 U.S. 18, 62 L. ed. 123 (1917).

2. Appellee seems to argue that GMAC cannot point to pages in the record which show that it is in the same class as other finance companies not affected by the Wisconsin Supreme Court decision. The Commissioner apparently contends that this violates the rule that a person must show facts which substantiate his claim that a statute is unconstitutional. It is apparent, however, that the entire record in this cause justifies the assumption of both appellant and appellee from the beginning of this litigation nearly four years ago, that GMAC is like any other finance company except that it wholly owns a subsidiary insurance company — or, if you will, that GMAC and MIC are "separate corporations in name only." See for example, the testimony of John F. Doyle, supervisor of appellee's consumers' credit agencies, Tr. pp. 397-452.

It is apparent, further, from the opinion of the Supreme Court of Wisconsin, that it considered the corporate relationship between GMAC and MIC the *only* significant difference between GMAC and the other finance companies operating in Wisconsin.

If appellee is arguing that it is this difference — ownership of MIC — which makes GMAC different from other finance companies in Wisconsin, he is, of course, arguing the merits of appellant's equal protection claim. Facts supplied by the exhibits and testimony in the present record as well as by common knowledge, provide ample basis to pass upon that claim.

3. Appellee states that our summary of the purpose of the Wisconsin statute "is misleading and utterly erroneous." Despite this broadside, it is apparent from even a hasty comparison that there is little substantial difference between appellant's and appellee's discussion of the same subject. The parties agree that "the competition between finance companies to see which one could pay the biggest kickback to the dealer", to quote appellee, was a primary purpose of Rule II. Appellee does not challenge appellant's demonstration that such a legislative purpose has no relation to a distinction between a finance company deemed one and the same as an insurance company, on the one hand, and finance companies independent of insurance companies, on the other, when it comes to the question of whether insurance commissions are to be regulated as part of dealer participation.[2]

4. Appellee contends that there was a finding of fact below that insurance commissions are "nothing but dealer participation", and that this somehow forecloses appellant in this Court. A careful reading of section II of appellee's Statement Opposing Jurisdiction reveals an adroit

---

[2] In stating that the purpose of the Wisconsin statute is solely a question of Wisconsin law, appellee ignores the well-settled principle that the legislature's discrimination must bear some reasonable relation to an object sought to be accomplished by the statute in question. See the many cases cited in appellant's Statement under the heading "THE QUESTIONS ARE SUBSTANTIAL", near the end of paragraph numbered 1.

attempt to establish a finding which was not in fact made. Aside from that, however, the argument will not stand analysis.

Appellee's assertion in this connection is, at most, another way of expressing the Wisconsin court's conclusion that GMAC and MIC are one and the same corporation. From that conclusion it follows necessarily that a payment of either insurance commissions or dealer participation by one of those corporations is also a payment by the other. GMAC has come to this Court because the result of this reasoning cannot be applied to finance companies affiliated with insurance companies and not to finance and insurance companies independent of each other, if Wisconsin is to escape the proscriptions of the Equal Protection Clause. As we demonstrated in our Statement, there is no logical or practical distinction, consistent with the purpose for which the statute and Rule II were adopted, which justifies Wisconsin's treatment of insurance commissions as dealer participation in the one case and treating them differently in the other. The public interest sought to be protected by the Rule is equally harmed, if harmed it is, by the one method of paying the dealer as by the other.

CONCLUSION

Appellee's arguments reinforce appellant's conclusions that this Court should note jurisdiction.

Respectfully submitted,

HENRY M. HOGAN,
Attorney for Appellant.

JACKSON M. BRUCE,
ANTHONY J. RUSSO,
Of Counsel.

May, 1951

No. 734. BAKER v. LEESTHOUTS ET AL.; and
No. 746. GENERAL MOTORS ACCEPTANCE CORP. v. COMMISSIONER OF BANKS OF WISCONSIN. Appeals from the Supreme Court of Wisconsin. *Per Curiam*: The appeals are dismissed for want of a substantial federal question. MR. JUSTICE JACKSON took no part in the consideration or decision of case No. 746. *Louis Quarles* for appellant in No. 734. *Jackson M. Bruce* and *Henry M. Hogan* for appellant in No. 746. *Vernon W. Thomson*, Attorney General of Wisconsin, and *Harold H. Persons*, Assistant Attorney General, for appellees in No. 734. *Mr. Thomson*, *Roy G. Tulane*, Assistant Attorney General, and *William E. Torkelson* for appellee in No. 746. Reported below: No. 734, 257 Wis. 584, 44 N. W. 2d 544; No. 746, 258 Wis. 56, 45 N. W. 2d 83.